NO. 87-1222

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALTON J. HOUSTON,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ADOLPH J. LEVY
518 South Rampart Street
New Orleans, Louisiana 70113
(504) 586-9707
Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

52p

QUESTIONS PRESENTED

1. Did the district court have jurisdiction over the plaintiff's claim when a Federal Drivers Act lawsuit was filed within one year of the plaintiff's accident in state court, when an administrative claim was timely filed and when the United States was not prejudiced by the state court filing?

2. Based upon Mathews v. Diaz, 426 U.S. 67 (1976), when a lawsuit is premature because it was filed before the plaintiff exhausted his administrative remedies, may that prematurity be cured by a supplemental petition?

3. Did the district court err in its assessment of damages of only $25,000 for pain and suffering and total damages of $121,887.20 when there was no testimony contrary to that of the witnesses who testified that the plaintiff had a com-

plete change of personality after his accident?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted, but does not include Question 3 among the reasons for the grant of certiorari.]

LIST OF PARTIES

The parties to the proceedings are the petitioner, Alton J. Houston and respondent, United States of America.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	i
LIST OF PARTIES.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	vii
OPINIONS BELOW.....	2
JURISDICTION.....	3
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT....	10
I. THE FILING OF A SUIT AGAINST A FEDERAL DRIVER IN STATE COURT IS SUFFICIENT, ON REMOVAL, TO GRANT FEDERAL JURISDICTION OVER A CLAIM AGAINST THE UNITED STATES. THE HOLDING OF THE FIFTH CIRCUIT TO THE CONTRARY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.....	10
II. A LAWSUIT WHICH IS PREMATURE BECAUSE IT WAS FILED BEFORE THE PLAINTIFF EXHAUSTED HIS ADMINISTRATIVE REMEDIES MAY BE CURED BY A SUPPLEMENTAL COMPLAINT.	

THE REFUSAL OF THE FIFTH CIRCUIT TO FOLLOW THAT RULE CONFLICTS WITH DECISIONS OF THIS COURT..... 21

III. IF THE OPINION REMAINS, PLAINTIFFS WILL BE REQUIRED TO FILE BOTH STATE COURT AND FEDERAL COURT SUITS IN ALL CASES INVOLVING FEDERAL DRIVERS. THIS IS BECAUSE A PLAINTIFF CAN NEVER "KNOW" WHEN THE FEDERAL TORT CLAIMS ACT WILL APPLY BECAUSE THE PLAINTIFF CAN NEVER KNOW WHEN A GOVERNMENT EMPLOYEE WAS ACTUALLY ACTING WITHIN THE COURSE OF HIS EMPLOYMENT..... 31

CONCLUSION..... 41

APPENDIX A:

I. Opinion of United States Court of Appeals for the Fifth Circuit..... A-1

II. Denial of Petition for Rehearing En Banc..... A-22

III. Minute Entry of United States District Court for the Eastern District of Louisiana..... A-23

IV. Judgment of the United States District Court for the Eastern District of Louisiana..... A-44

V. Amended Judgment of the United States District Court for the Eastern District of Louisiana.. A-45

VI. Order of the United States District Court for the Eastern District of Louisiana.. A-46

VII. Opinion of United States District Court for the Eastern District of Louisiana.. A-47

STATUTES AND REGULATIONS.... A-60

TABLE OF AUTHORITIES

CASES	PAGE
Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971)	17
Borrego v. United States, 622 F.Supp. 457 (D. Puerto Rico 1985), rev'd, 790 F.2d 5 (1st Cir. 1986)	35,36
Erwin v. United States, 445 F.2d 1035 (10th Cir. 1971), cert. denied, 404 U.S. 992, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971)	35
Henderson v. United States, 429 F.2d 588 (10th Cir. 1970)	13,18,40
Henderson v. United States, 785 F.2d 121 (4th Cir. 1986)	17
Kelley v. United States, 568 F.2d 259 (2d Cir. 1978), cert denied, 439 U.S. 829, 99 S.Ct. 106, 58 L.Ed.2d 123 (1978)	13,15,18,40
Long v. United States, 78 F. Supp. 35 (S.D.Cal. 1948)	34
Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976)	i,16,22-26,28,31,39
McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980)	12,13,18,40

Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970)..... 17

Meta-Film Associates, Inc. v. MCA, Inc., 586 F.Supp. 1346 (C.D. Cal. 1984)..... 29

Miller v. United States, 741 F.2d 148 (7th Cir. 1984).....13,18,40

Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp. 838 (D.Mass. 1986)..... 29

Reynaud v. United States, 259 F.Supp. 945 (W.D.Mo. 1966)..... 14,40

Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984)..... 22,25

Robinson v. United States, 408 F.Supp. 132 (N.D. Ill. 1976).....14,15,18,40

Rogers v. United States, 675 F.2d 123, (6th Cir. 1982)..... 17

Sanchez v. United States, 177 F. 2d 452 (10th Cir. 1949)..... 35

Security Insurance Company of New Haven, Conn. v. United States, 338 F.2d 444 (9th Cir. 1964)..... 26-27

Seiden v. United States, 537 F.2d 867 (6th Cir. 1976).... 35

Staple v. United States, 740 F.2d 766 (9th Cir.

1984).....11-13,15,18,40

Tomack v. United States, 369 F.2d 350 (2d Cir. 1966)..... 34

Tuepker v. Farmers Home Administration, 538 F.Supp. 375 (W.D. Mo. 1982)..... 24-26

United States v. C. J. Electrical Contractors, Inc., 535 F.2d 1326 (1st Cir. 1976)..... 29

United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952)... 34

United States v. LePatourel, 571 F.2d 405 (8th Cir. 1978)... 18

Whistler v. United States, 252 F.Supp. 913 (N.D. Ind. 1966).....14,15,18,40

Wilkinson v. United States, 677 F.2d 998 (4th Cir.)..... 17

Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980)..... 17

STATUTES

Federal Drivers Act, 28 U,S.C. § 2679(b)-(e).....3,5,7,10,14,32, passim,A-6

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401 and 2671-2680....5,38-39, passim, A-60

RULES AND REGULATIONS

Federal Rules of Civil Procedure, Rule 15..... 29,30

28 C.F.R. § 15.3(a)..... 35,A-63

MISCELLANEOUS

S.Rep. No. 1327, 89th Cong., 2d Sess., (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 2515, 2518; H.R. Rep. No. 1532, 89th Cong., 2d Sess., p. 8 (1966)..... 19

Moore, Federal Practice, 2d Ed., ¶ 15.15[5]..... 30

Wright & Miller, Federal Practice & Procedure, § 1505..... 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO.

ALTON J. HOUSTON,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Plaintiff, Alton J. Houston, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 13, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 823 F.2d 896, and is reprinted in the appendix hereto, p. A-1.

The denial of the petitions for rehearing and rehearing en banc by the Court of Appeals for the Fifth Circuit is reported at 830 F.2d 1126, and is reprinted in the appendix hereto, p. A-22.

The memorandum decision of the United States District Court for the Eastern District of Louisiana (Sear, D.J.) has not been reported. It is reprinted in the

App., p. A-23.

The amended judgment of the United States District Court for the Eastern District of Louisiana has not been reported. It is reprinted in the Appendix, p. A-45.

The order of the district court denying the motion of the United States for failure to prosecute has not been reported. It is reprinted in the Appendix, p. A-46.

The minute entry denying the motion for summary judgment filed by the United States has not been reported. It is reprinted in the Appendix, p. A-47.

JURISDICTION

This is a case involving a Federal Drivers Act claim, 28 U.S.C. § 2679, and a claim under the Federal Tort Claims Act. The date of the entry of judgment of the court of appeals was August 13, 1987. A timely application for rehearing was

filed. The application for rehearing was denied on September 23, 1987. Jurisdiction of this court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved:

28 U.S.C. § 1346. United States as defendant

28 U.S.C. § 2401(b). Time for commencing action against United States

28 U.S.C. § 2675(a). Disposition by federal agency as prerequisite; evidence

28 U.S.C. § 2679. Exclusiveness of remedy

28 C.F.R. § 15.3(a). Removal and defense of suits

The text of the foregoing are set forth in the Appendix, pp. A-60, et seq.

STATEMENT OF THE CASE

Plaintiff, Alton J. Houston, was injured when a United States Postal Service vehicle hit a part of the parked

Sewerage and Water Board vehicle in which he was seated. The accident occurred on January 27, 1976. On that very day, an investigation was made by a Postal Service representative and a series of photographs were taken by him while the vehicles were still on the scene. A New Orleans police officer arrived within 20 minutes of the accident and performed a complete accident investigation while the vehicles were still on the scene.

Both the Federal Drivers Act, 28 U.S.C. § 2697(b)-(e) and the Federal Tort Claims Act, codified in pertinent part at 28 U.S.C. §§ 1346(b), 1402(b), 2401 and 2671-2680, applied in this case because the accident involved a federal vehicle.

On January 27, 1977, plaintiff filed suit in state court against the United States Postal Service, the United States of America and the driver, Joseph Howard.

On January 17, 1978, an administra-

tive claim was filed with the United States Postal Service. That claim was denied on April 26, 1978. Plaintiff, on April 21, 1980, amended his state court petition to show that the United States had denied the administrative claim. Service of the suit was made on the United States and the United States Postal Service in April 1980.

The plaintiff did not not attempt to delay the service of process. Rather, the delay in service was due to the failure of law office personnel to properly diary the case when the denial of the claim arrived. Nevertheless, as is reflected below, the United States was not prejudiced because of the delay. Further, because the case involves the Federal Drivers Act, the filing in state court was sufficient to constitute timely action.

The United States removed the state court suit to federal court. It filed a

motion to dismiss and urged that neither federal court nor state court had jurisdiction. The federal district court, in a lengthy opinion, found that it had jurisdiction of the Federal Drivers Act case based upon the following:

1. The state district court had jurisdiction over the claim against Joseph Howard, the federal driver. App., p. A-49.

2. The state district court had jurisdiction over that claim pursuant to the Federal Drivers Act, 28 U.S.C. § 2697(b)-(e). Id.

3. Upon removal, the United States is substituted for the driver and the proceeding is deemed one against the United States under the Federal Tort Claims Act. Id.

4. If the Federal Drivers Act applied, the federal district court had jurisdiction over the United States for a claim originally asserted against its driver in state court. Id., 49-50.

5. The Federal Drivers Act applied. (See No. 2 above.)

6. Filing suit in state court tolled the statute of limitations for the Federal Drivers Act. App., pp. A-54-55.

When it denied the motion to dismiss of the United States, the district court invited the United States to file a motion to dismiss for failure to prosecute. One factor in determining whether the failure to prosecute motion would be granted was whether the government had been prejudiced by any time delays. The government filed that motion to dismiss. Nowhere in that motion did the United States argue that it was in any way prejudiced by any delays. Plaintiff filed an opposition to the motion. The court denied the government's motion to dismiss for failure to prosecute.

The United States has never alleged that it has been prejudiced in any way because of plaintiff's failure to serve the state court suit. It is apparent that there was no prejudice, because there was both a police investigation on the day of the accident and a Postal Service investi-

gation complete with the Service's photographs which were taken virtually immediately after the accident. Indeed, both the Postal Service driver and the policeman who investigated the accident testified at trial. Photographs which had been taken at the scene were also admitted into evidence. Thus, the United States was not prejudiced by reason of any delay.

After a three-day trial, the government again filed a Motion to Dismiss for Lack of Jurisdiction. The district court again found that there was jurisdiction and that the action was brought within the time limitations of the Federal Tort Claims Act. App., p. A-24.

Judgment was rendered in favor of plaintiff for $25,000 general damages and special damages of $96,887.20, for a total of $121,887.20, all with interest.

The government filed a motion to amend the judgment to delete the award of

interest. Plaintiff had no objection to the motion and an amended judgment was signed. App., p. A-45. The government appealed the amended judgment and plaintiff cross-appealed as to the damages awarded.

The Court of Appeals panel reversed the opinion of Judge Sear. App., p. A-1. Petitions for rehearing and rehearing en banc were denied. App., p. A-22.

REASONS FOR GRANTING THE WRIT

I. THE FILING OF A SUIT AGAINST A FEDERAL DRIVER IN STATE COURT IS SUFFICIENT, ON REMOVAL, TO GRANT FEDERAL JURISDICTION OVER A CLAIM AGAINST THE UNITED STATES. THE HOLDING OF THE FIFTH CIRCUIT TO THE CONTRARY CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

This case involves a special type of claim -- it is one against a federal driver. For that reason, the Federal Drivers Act applies.[1] Cases have held that when timely suits have been filed

---

[1] 28 U.S.C. § 2679(b)-(e).

against federal drivers in state courts, federal courts have jurisdiction of those cases under the Federal Tort Claims Act. The only distinction which would arise in this case is that the suit was filed prior to and not subsequent to the denial of the administrative claim.

Indeed, cases from other circuits have held that the filing of a suit in state court against a federal driver was valid -- even when no administrative claim had been filed. One such case is Staple v. United States, 740 F.2d 766 (9th Cir. 1984). The court of appeal stated the issues before it, those issues being virtually identical to those before this court:

> "Lillian Staple filed this tort suit in state court against an individual employee of the federal government. The Attorney General removed it to federal court and substituted the United States as defendant pursuant to the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) ('Drivers Act'). We must first decide whether the action was

> properly dismissed in federal court on the ground that Staple filed it in state court before exhausting her federal administrative remedy. We must then determine whether the suit is time-barred because removal occurred after the statute of limitations for actions against the United States had run. We answer both questions in favor of federal jurisdiction and reverse." Id. at 767.

The court "decline[d] to extend the exhaustion requirements of section 2675(a) [the six-month suit requirement of the Federal Tort Claims Act] to state court suits against an individual." Id. at 768. In addition, the two-year claim requirement of the Federal Tort Claims Act was held to have been met by the filing of the suit in state court. As the court stated:

> "The court [in McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980)] concluded that the original date of filing should be effective under both state and federal law. Id. at 1242. We agree. The place of filing may be state court for the purpose of applying section 2401(b) to the certification and removal procedure of the Drivers Act." Id. at 769-770.

In addition to Staple, at least six other cases have also held that a suit against a federal driver in state court was sufficient to give the federal court jurisdiction over the removed action:

Henderson v. United States, 429 F.2d 588 (10th Cir. 1970) (suit filed in state court deemed sufficient).

Kelley v. United States, 568 F.2d 259 (2d Cir. 1978), cert. denied, 439 U.S. 829, 99 S.Ct. 106, 58 L.Ed.2d 123 (1978) (suit filed in state court without exhausting administrative remedies was sufficient).

McGowan v. Williams, 623 F.2d 1239, 1242-43 (7th Cir. 1980) (reversing dismissal of a claim because the state suit against the individual, filed after the administrative denial, met the FTCA's requirements even though the case was not removed to federal court until after the limitations period expired).

Miller v. United States, 741 F.2d 148,150 (7th Cir. 1984) (reversing the dismissal of a claim arising from a collision with a USPS vehicle. The state court suit against the individual was filed and removed to federal court within six months of the administrative denial, thus timely making the United States a proper party).

Robinson v. United States, 408 F.Supp. 132,135 (N.D.Ill. 1976) (suit filed in state court before denial of administrative claim).

Whistler v. United States, 252 F.Supp. 913 (N.D.Ind. 1966) (suit filed in state court without exhausting administrative remedies deemed sufficient).

See also Reynaud v. United States, 259 F.Supp. 945 (W.D.Mo. 1966) (dictum) (suit in state court deemed sufficient).

The reason for permitting the state court suit to be sufficient in Federal Drivers Act cases was discussed extensively in Whistler:

"While federal tort claim litigation is now barred from the state courts, there is no indication that Congress intended by this legislation to make the federal tort claim statute of limitations a bar to all state actions not removed within the two-year period. There is good reason why Congress did not require this. A plaintiff has no control over such removal. There is no sure way that a plaintiff can know his action is an appropriate federal tort claim until the Attorney General certifies that the employee was acting within the scope of his employment at the time of the incident which gave rise to the claim. There is no good reason

why a plaintiff should trust the United States to concede that element of its own liability on any case that is filed in a federal court. If the employee was not acting within the scope of his employment at the crucial time, the plaintiff has a right of action against the individual employee and has a right to bring that action in the state court and demand a jury trial if he so desires. At the time a suit is filed, the issue of employment cannot yet have been determined. If a suit is filed in federal court and it later is determined that the employee was not acting within the scope of his employment, the suit may be dismissed for lack of jurisdiction. The plaintiff may then be without a remedy if the statute has run in the state court. All this may occur although the plaintiff has a good case against the individual employee and has initiated an action within two years." (Emphasis added.) 252 F.Supp. at 916.

In Staple, Kelley and Robinson the state court suit, as here, was filed before the administrative claim was denied. In Whistler, no administrative claim was even filed.

The foregoing cases are important here because in this case plaintiff did

file a timely administrative claim and the government was given the ability to administratively settle the claim. Thus, the purpose of the 1966 amendments to the Federal Tort Claims Act were met. See Opinion of Fifth Circuit, App., pp. A-7-8. If a state suit where no administrative claim had been filed was valid, then certainly a state suit in which an administrative claim had been filed should, under Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) be able to be amended to show that the administrative claim had been filed.[2]

The court stated that its interpretation was "consistent with the majority of cases discussing the FTCA in its post-1966 era." App., p. A-9. However, all of the cited cases involved situations in which

---

[2] Mathews is extensively discussed in pp. 22, et seq., infra.

the plaintiff had bypassed the administrative claim procedure. Those cited cases are as follows:

> Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986) (dismissing a claim arising from collision with USPS vehicle for failure to file administrative claim within section 2401(b) limitations period).
>
> Rogers v. United States, 675 F.2d 123, 124 (6th Cir. 1982) (same).
>
> Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir. 1971) (same).
>
> Meeker v. United States, 435 F.2d 1219, 1222 (8th Cir. 1970) (same).
>
> Wilkinson v. United States, 677 F.2d 998, 1000 (4th Cir.) (affirming the dismissal of a claim arising from a collision with an automobile driven by a serviceman while on duty because claimant failed to seek administrative relief), cert. denied, 459 U.S. 906, 103 S.Ct. 209, 74 L.Ed.2d 167 (1982).
>
> Wollman v. Gross, 637 F.2d 544 (8th Cir. 1980) (affirming dismissal of a claim arising from a collision with an automobile driven by an employee of the Agricultural Stabilization and Conservation Service because the plaintiff's claim for administrative relief was untimely), cert. denied, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d 207 (1981).

United States v. LePatourel, 571 F.2d 405, 410 (8th Cir. 1978) (reversing the district court's refusal to dismiss a claim arising from a collision with vehicle driven by a federal judge because claimant failed to seek administrative relief), modified to apply prospectively, 593 F.2d 827 (8th Cir. 1979) (en banc).

Therefore, those cases are not relevant herein because Houston did not bypass the procedure -- he complied with it. Houston did not attempt to bypass the system -- Houston complied with the system. The United States was given an opportunity to dispose of Mr. Houston's claim. However, it denied the claim. The purposes of the Federal Tort Claims Act were met. When the irrelevant cases are disregarded, Miller, Staple, McGowan, Kelley, Henderson (of the 10th Circuit), Robinson and Whistler become the majority -- if not exclusive -- rule. Houston falls squarely within that majority rule -- suit in state court is sufficient to

grant federal jurisdiction when the case is removed to federal court.

Congressional history may, as the court pointed out, mandate that a plaintiff in the ordinary Federal Tort Claims Act case file that administrative claim. The purpose of the administrative requirement is to "reduce unnecessary congestion in the courts" by permitting an administrative settlement of the claims against the United States.[3]

If this court were to delete from the above list of authorities all of the cases which had been dismissed because the plaintiff had failed to file a timely claim, no cases would remain which would be in the government's favor. Indeed, the remaining cases would be the plaintiff-

---

[3] S.Rep. No. 1327, 89th Cong., 2d Sess., (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 2515, 2518; H.R. Rep. No. 1532, 89th Cong., 2d Sess., p. 8 (1966).

favorable cases.

The citations of the Fifth Circuit to Jayson[4] and the Comment in the Emory Law Journal[5] also lack relevance as authority in the case at bar. This is because they, too, discuss situations and cases in which plaintiffs had failed to file administrative claims. They fail to discuss situations and cases in which plaintiffs had filed administrative claims.

When the real "majority" -- if not exclusive -- opinion regarding Federal Drivers Act cases is combined with the fact that the plaintiff did in fact file an administrative claim timely, the dis-

---

[4] L. Jayson, Handling Federal Tort Claims, § 175.03[2] at 6-27, cited on App., p. A-19.

[5] Comment, Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of The Federal Tort Claims Act?, 29 Emory L.J. 755, 775 (1980), cited on App., p. A-4.

trict court was correct in finding that federal court had jurisdiction over Houston's claim.

Based on the foregoing, it is submitted that the authorities cited by the United States and relied upon by the court do not support the denial of this plaintiff's claim because he did, in fact, exhaust his administrative remedies. The remaining cases support the timeliness of the plaintiff's claim.

Thus, the state court suit in this Federal Drivers Act case interrupted the statute of limitations as to the United States and the district court had jurisdiction over the removed action.

II. A LAWSUIT WHICH IS PREMATURE BECAUSE IT WAS FILED BEFORE THE PLAINTIFF EXHAUSTED HIS ADMINISTRATIVE REMEDIES MAY BE CURED BY A SUPPLEMENTAL COMPLAINT. THE REFUSAL OF THE FIFTH CIRCUIT TO FOLLOW THAT RULE CONFLICTS WITH DECISIONS OF THIS COURT.

One of the major issues in this case

is whether a premature lawsuit may be cured by a supplemental pleading. In this case, the lawsuit, according to the Fifth Circuit, was premature because it was filed before the plaintiff had filed his administrative claim. The result of the court's holding is that if a lawsuit is premature, it is hopelessly premature because the prematurity may not be cured. The Fifth Circuit relied on Reynolds v. United States, 748 F.2d 291 (5th Cir. 1984) in support of its opinion. App., p. A-18. Reynolds and the opinion in the case at bar are in direct conflict with Mathews v. Diaz, 426 U.S. 67, 75, 96 S.Ct. 1883, 1889, 48 L.Ed.2d 478 (1976). Mathews held that if a lawsuit was premature because of a jurisdictional defect when it was filed, subsequent events could cure that prematurity when the allegations of the original suit were supplemented.

In Mathews, an alien challenged the constitutionality of a provision of the Social Security Act which related to aliens. The plaintiff had failed to file a required application with the Department of Health, Education and Welfare before he filed suit. The Secretary of the Department of Health, Education and Welfare raised a defense that the court lacked jurisdiction over the plaintiff's action because of the plaintiff's failure to exhaust his administrative remedies prior to his filing of suit. Similarly, in the case at bar, plaintiff's failure was his failure to exhaust administrative remedies before he filed suit. This Court stated as follows in holding that the jurisdictional prematurity could be cured:

> "We must therefore decide whether the District Court had jurisdiction over Espinosa's claim.
>
> "We have little difficulty with Espinosa's failure to file an appli-

cation with the Secretary until after he was joined in the action. Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, Mathews v. Eldridge, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 1829 (1976); Weinberger v. Salfi, 422 U.S., at 764, 95 S.Ct., at 2466, 45 L.Ed.2d, at 538, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact. Under these circumstances, we treat the pleadings as properly supplemented by the Secretary's stipulation that Espinosa had filed an application." (Emphasis added.) (Footnotes omitted.) 426 U.S. at 74-75, 96 S.Ct. at 1889.

In fact, Mathews has been followed in a Federal Tort Claims Act case. In that case, the government filed a motion to dismiss and argued that the complaint was premature because the plaintiff had not exhausted his administrative remedies. Tuepker v. Farmers Home Administration,

538 F.Supp. 375,376 (W.D. Mo. 1982). The court held that the prematurity had been cured, and citing Mathews, stated as follows:

> "We consider plaintiff's 'second amended petition' which alleges final denial of his administrative claim as a supplemental complaint. A jurisdictional precondition requiring filing of an agency complaint prior to review in the courts can be satisfied by a supplemental complaint." (Emphasis added.) Id. at 376, fn.1.

Unfortunately, neither the plaintiff nor the government brought either Mathews or Tuepker to the attention of the court in Reynolds, where the court held that a premature FTCA suit was, in essence, hopelessly premature. The Fifth Circuit relied on Reynolds in making a distinction which it stated was "especially important" and in also stating that if Houston's case had been removed, "the judge would have had to dismiss the case for lack of jurisdiction." App., p. A-19. Under Mathews

and Tuepker, the court was simply wrong in its conclusion as to the irremedial effect of the prematurity.

A case cited by this Court as authority for its holding in Mathews is particularly instructive. That case, Security Insurance Company of New Haven, Conn. v. United States, 338 F.2d 444 (9th Cir. 1964) involved a Miller Act claim. The Miller Act in part required that a creditor had to submit a claim and wait ninety days after the last material was furnished before he could file a lawsuit. The act also set forth a one-year statute of limitations for filing suit. Id. at 445. Unfortunately for the plaintiff, the complaint was premature because it was filed less than 90 days after the last material was supplied. The plaintiff later supplemented his complaint to show that more than 90 days had passed by the time the

supplement was filed. However, that supplement was filed after the one-year statute of limitations had passed. Thus, the question was whether the plaintiff's claim was barred by the statute of limitations.

The defendant's argument in Security Insurance was similar to the one urged by the government in the case at bar. The court set forth the defendant's argument:

> "Appellant's argument, in substance, is this: When the complaint was filed the plaintiff had no claim for relief because the ninety-day period specified in subsection (a) supra had not expired. When the supplement to the complaint was filed, more than one year from the pertinent date had expired." Id. at 445-446.

The court of appeals responded in Security Insurance as follows:

> "Nothing but the most compelling authority, emanating from the Supreme Court of the United States itself, would induce us to stay on this legal merry-go-round." Id. at 446.

It then cited one of its prior opinions in which it had held that an amend-

ment adding later facts should be treated as a supplemental complaint rather than an amended complaint based upon "the remedial purpose of Rule 15." Id. at 448.

It then held that the supplemental complaint could relate back to the initial filing so as to prevent the one-year statute of limitations from barring the action. It also held that it was "not required to apply the doctrine of relation back so literally as to carry it to a time within the ninety-day period specified in subdivision (a), so as to prevent the maintenance of the action in the first place." Id. at 449. The court, as did this Court in Mathews, thus permitted the prematurity of the lawsuit to be cured even when that prematurity related to a jurisdictional prerequisite of exhausting administrative remedies.

The principle that a premature law-

suit may be cured has also been followed in the following cases:

1. A lawsuit for invasion of a copyright was filed before the plaintiff had recorded the assignments by which it had obtained its rights to the copyright. Although the suit was premature because the required governmental recording had not been accomplished, that prematurity was cured by an amendment reflecting that the assignment had been recorded after the lawsuit was filed. Meta-Film Associates, Inc. v. MCA, Inc., 586 F.Supp. 1346, 1350-1352 (C.D. Cal. 1984). See also Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F.Supp. 838, 850-851 (D. Mass. 1986).

2. A Miller Act suit was filed before the required ninety days had elapsed from the date on which the last material had been supplied by the plaintiff. The court of appeals held that a supplemental pleading curing the prematurity should be permitted. United States v. C. J. Electrical Contractors, Inc., 535 F.2d 1326, 1330 (1st Cir. 1976).

Federal Rule of Civil Procedure 15 has also been discussed by the doctrinal writers. For instance, Professor Moore

states as follows:

> "Occasionally, parties against whom an amendment is sought have invoked relation back to contend that a claim stated in a proposed amendment was premature; courts, however, have generally refused to apply Rule 15(c) 'involuntarily' in this manner to penalize the party seeking the amendment." (Emphasis added.) Moore, Federal Practice, 2d Ed., ¶ 15.15[5].

Wright and Miller also discuss Rule 15(d). They note that 15(d) was added to prevent a plaintiff from having "to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief" because that would be "inconsistent with the philosophy of the federal rules." Wright & Miller, Federal Practice & Procedure, § 1505. They also note that, "a supplemental pleading has been used for such purposes as alleging that sufficient time has elapsed to cure a premature filing..." (Emphasis added.) Id.

Applying the principle of prematurity to the case at bar, although Houston's lawsuit was premature when it was filed, that prematurity was cured by the supplemental and amending petition which was filed on April 21, 1980. Based on Mathews and the other authorities cited above, if the suit had been filed in Federal court, the prematurity would have been cured.

As has been reflected in I, supra, the fact that the suit was filed in state court is no defense to the jurisdiction of federal court after the suit was removed. Similarly, because the administrative claim requirement was met, the fact that the suit was filed before and not after the denial of the claim is no defense to the merits of the claim.

III. IF THE OPINION REMAINS, PLAINTIFFS WILL BE REQUIRED TO FILE BOTH STATE COURT AND FEDERAL COURT SUITS IN ALL CASES INVOLVING FEDERAL DRIVERS. THIS IS BECAUSE A PLAINTIFF CAN NEVER "KNOW" WHEN THE FEDERAL TORT CLAIMS

ACT WILL APPLY BECAUSE THE PLAINTIFF CAN NEVER KNOW WHEN A GOVERNMENT EMPLOYEE WAS ACTUALLY ACTING WITHIN THE COURSE OF HIS EMPLOYMENT.

The Federal Drivers Act provides that when suits against federal drivers are filed in state court, those suits can be removed to federal court when the driver was acting within the scope of his employment at the time of the accident. In such cases, the United States is substituted for the driver and the action is deemed to be against the United States. A problem arises because there are times when the driver was driving a federal vehicle and was not within the scope of his employment at the time of the accident. In such a case, the United States would not be liable and if suit against the driver had not been filed in state court, then the statute of limitations as to the individual driver would not have been interrupted.

The Fifth Circuit, in its opinion, assumes that the plaintiff should have been certain that the driver of the marked Postal Service car was driving that car "in the course of his employment." App., p. A-14. Unfortunately, plaintiffs have relied upon similar assumptions only to have their cases dismissed because the government proved that the driver of the government vehicle was not in the course of his employment when he injured the plaintiffs.

Government-owned vehicles will almost always have some type of government identification. At the very least, virtually every government-owned automobile will have a federal license plate. That license plate at a bare minimum, according to the court's theory, should indicate to a plaintiff that his action against the driver would fall under the Federal Tort

Claims Act. Unfortunately, many plaintiffs have rested upon that assumption. They, however, have learned to their dismay that they had no case against the government because the government proved that the driver of the federal vehicle was not in the scope of his employment at the time of the accident.

The following is a list of cases in which a federal driver driving a federal vehicle was held not to be in the scope of his employment at the time of the accident:

1. An employee of the Small Business Administration was driving a government automobile. Tomack v. United States, 369 F.2d 350 (2d Cir. 1966).

2. A member of a geological and topographical survey was driving a United States Geological Survey truck. United States v. Lushbough, 200 F.2d 717 (8th Cir. 1952).

3. A war department employee was driving an Army Staff car. Long v. United States, 78 F.Supp. 35

(S.D. Cal. 1948).

4. An employee of the Atomic Energy Commission Security Service was driving a government vehicle. Sanchez v. United States, 177 F.2d 452 (10th Cir. 1949).

5. A VISTA worker was driving a government vehicle. Erwin v. United States, 445 F.2d 1035 (10th Cir. 1971), cert. denied, 404 U.S. 992, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971).

To make matters worse, the government may vacillate in its decision as to whether it will argue that a driver was within the scope of his employment. In addition, even if the government's position is that the driver was within the scope of his employment, that decision is not binding on the courts. Seiden v. United States, 537 F.2d 867, 870 (6th Cir. 1976). The government may also withdraw its admission at any time. 28 C.F.R. § 15.3(a). App., p. A-63.

Borrego v. United States, 622 F.Supp. 457 (D.Puerto Rico 1985), rev'd, 790 F.2d

5 (1st Cir. 1986) was one more in the line of cases in which the government claimed that the federal driver was not in the scope of employment at the time of the accident. In Borrego, the plaintiff filed suit against the United States after having exhausted the administrative claim process. Id., 622 F.Supp. at 458. The government argued that the employee was not acting within the scope of his employment -- even though the accident occurred at 11:45 a.m. when the employee-driver was operating a federal vehicle owned by the federal government. The government's position was upheld by the district court. It was only on appeal that the plaintiff was able to save his potential case against the United States. The court of appeals reversed the district court and held that the driver was within the scope of his employment when the accident

occurred.

It should be noted, however, that the ultimate reason that the court of appeals gave for reversing was:

> "A majority of the court believes it would be inequitable, under those circumstances, to force the employee to assume personal liability in a situation where the use of the government's car is only of incidental benefit to the employee." Id., 790 F.2d at 8.

Thus, it was apparently equity more than law which permitted the plaintiff's case to remain in court. If the government's position had been maintained, then, in all probability, the statute of limitations in the action against the driver in state court would have run and the driver would have had no remedy.

The government has suggested that an injured party should file two suits to be fully protected. Lawyers should not be forced to clog courthouses with protective suits in order to safeguard their clients

and themselves against a United States Attorney arguing that a government driver was not within the scope of employment when an accident occurred. If the Fifth Circuit's rule is to be followed, all plaintiffs will have to file two suits in every case against every federal driver in order to fully protect themselves. That, in turn, will clog the dockets of both state and federal courts with protective suits, which protective suits should not be required. It will also entail each plaintiff having to unnecessarily pay for the filing of two suits.

The purpose of the amendment to the Federal Tort Claims Act was "to reduce unnecessary congestion in the courts."[6] The requirement that two suits must be filed in every case will cause a result which is diametrically opposed to the

---

[6] See n. 3, supra.

purpose of the amendment. Rather than reducing unnecessary congestion, the two-suit requirement will increase the very "unnecessary congestion in the courts" that the Federal Tort Claims Act is attempting to eliminate.

The rationale of Mathews v. Diaz, supra, pp. 22, et seq., supra, would permit a plaintiff to file only one suit to protect his rights against the driver and the United States. He would be protected whether or not the driver was in the scope of his employment. Thus, courts would not be burdened with protective lawsuits which plaintiffs were required to file because of the opinion of the Fifth Circuit in the case at bar.

Applying Mathews to cure the prematurity herein will thus result in judicial economy and comply with the intent of the Federal Tort Claims Act to "reduce conges-

tion in the courts" because then all cases involving federal drivers will not have to be filed in both state and federal courts.

Based upon the foregoing, and upon the Fifth Circuit's opinion, every plaintiff will always have to file two lawsuits in every automobile case in order to protect his rights. He will have to file a federal and a state suit. Congress certainly did not intend, when it passed the Federal Drivers Act, to require all plaintiffs to file two suits. It may have intended to require an administrative claim -- but Houston complied with that requirement. Although he did file a lawsuit prior to the denial of the claim, cases such as Miller, Staple, McGowan, Kelley, Henderson (of the 10th Circuit), Robinson, Whistler and Reynaud have held that the filing of that state suit was sufficient.

It is submitted that this Court should accept certiorari, adopt the real majority -- if not exclusive -- rule and hold that federal court has jurisdiction over a removed state court suit at least when (1) that suit was timely filed within the federal two-year period and (2) where an administrative claim was timely filed and the administrative claim procedure was not bypassed.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,

ADOLPH J. LEVY
518 South Rampart Street
New Orleans, Louisiana 70113
Telephone: (504) 586-9707

Attorney for Petitioner,
Alton J. Houston

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-1222

NO.

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALTON J. HOUSTON,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

ADOLPH J. LEVY
518 South Rampart Street
New Orleans, Louisiana 70113
(504) 586-9707
Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CROSS-REFERENCES FROM

PETITION FOR WRIT OF CERTIORARI

TO REVISED APPENDIX

PAGE IN ORIGINAL APPENDIX	PAGE IN REVISED APPENDIX
A-1	A-1
A-4	A-7
A-6[1]	A-109
A-7-8	A-12-14
A-9	A-16
A-14	A-25
A-18	A-34
A-19	A-34
A-22	A-41
A-23	A-43
A-24	A-45-46
A-44	A-77
A-45	A-79
A-46	A-81

[1] This should have been typed A-61.

A-47
A-49
A-54-55
A-60
A-63
A-82
A-86-87
A-96
A-107
A-113

APPENDIX A

I. Opinion of United States Court of Appeals for the Fifth Circuit.

Alton J. HOUSTON, Plaintiff-Appellee, Cross-Appellant,

v.

UNITED STATES POSTAL SERVICE, et al., Defendants-Appellants, Cross-Appellees.

No. 85-3639.

United States Court of Appeals, Fifth Circuit.

Aug. 13, 1987.

Before WISDOM, JOHNSON and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge:

The question in this Federal Tort Claims Act case is whether the district court had jurisdiction to try Alton Houston's suit against the United States. We hold that the lower court lacked juris-

diction and accordingly reverse the judgment below and dismiss the case.

Facts and Proceedings Below

When the events giving rise to this suit occurred, Alton Houston was a laborer for the New Orleans Sewerage and Water Board. On January 27, 1976, he was sitting in a large city truck parked in a crowded New Orleans street when a United States Postal Service (USPS) van, clearly marked as such, collided with the mirror of the city truck. Except for the shattered mirror, the truck was not damaged.

According to Houston, this impact caused him a variety of injuries, including back problems and alcohol dependency. These injuries reduced his earning potential. The district court found in Houston's favor and held the United States liable for $121,887.20.

The procedural history of the case is

quite important. On January 27, 1977, one year after the collision, Houston sued the United States; Joseph Howard, the driver of the postal van; and the USPS in Louisiana court. Pursuant to his direction, process was not issued or served.

Just under two years after the accident, on January 17, 1978, Houston filed an administrative claim with the USPS. As we will explain, the filing of such an administrative claim within two years after its accrual was required by the Federal Tort Claims Act (FTCA) (codified at 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680). About three months after this claim was filed, the USPS notified Houston's attorney of its denial. That notification letter, dated April 26, 1978, stated, "[I]f your client is dissatisfied with the final action on his clain [sic], he may

file suit in an appropriate United States District Court not later than six months from the date of this letter." (Emphasis added.) The six-month limitations period explained in the letter is codified at 28 U.S.C. § 2401(b). Houston's counsel stated during oral argument in this court that the denial letter was not "diaried" on a "prescription card" at his law firm. Because of this oversight, it was not until April 23, 1980, almost two years after the administrative denial, that Houston for the first time caused process in his Louisiana court suit to be served on the defendants therein.

After being served, the United States removed the case to federal court, as authorized by 28 U.S.C. §§ 1441(a) and 1442(a)(1). (For some reason, the United States did not rely on the FTCA removal statute--28 U.S.C. § 2679(d).) The USPS

and the United States moved to dismiss the case on grounds that the United States was the only proper defendant and Houston had not sued it within six months of the administrative denial of his claim.

The district court dismissed the USPS (and Howard), but denied the dismissal motion as to the United States. In a thorough opinion, the court reasoned that Houston's state court suit sufficed as timely compliance with the limitations requirement of the FTCA. Because the district court considered the state suit sufficient under the FTCA, it did not view Houston's long delay in serving process as a jurisdictional defect. After a bench trial that covered portions of three days, the court rendered judgment for Houston.

The United States appeals the judgment asserting that the district court lacked jurisdiction to try the case due to

Houston's alleged noncompliance with the FTCA limitations period. Houston cross-appeals, complaining that the district court's $25,000 award for pain and suffering is too low.

Discussion

Essentially, this case raises only two questions: (1) whether the FTCA's procedural requisites apply to a tort claim arising out of a collision with a government vehicle; and, (2) if the FTCA's procedural requirements apply, whether Houston complied with them. We answer "yes" to the first question and "no" to the second.

I.

"The United States, as sovereign, is immune from suit save as it consents to be sued...." United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941). In construing waivers of sove-

reign immunity, courts are not free to extend or narrow the waiver beyond what Congress intended. United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 357, 62 L.Ed.2d 259 (1979). These familiar axioms undergird our analysis.

In various statutes through the years, Congress has carved into the immunity of the federal government. See generally Hulen, Suits on Tort Claims Against the United States, 7 F.R.D. 689, 689-90 (1948) (discussing, inter alia, the Tucker Act); Comment, Administrative Claims and the Substitution of the United States as Defendant Under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?, 29 Emory L.J. 755, 758 (1980) (citing several statutory examples of sovereign immunity waiver). An important such waiver occurred in 1946, when Congress passed the FTCA. See Hulen, 7

F.R.D. 689 (explaining the original version of the FTCA). The FTCA provides that the United States is liable for damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2675(a).[1]

---

[1] The Postal Reorganization Act of 1970, codified as Title 39 of the United States Code, waives sovereign immunity "with respect to the Postal Service." Franchise Tax Bd. of Calif. v. U.S. Postal Service, 467 U.S. 512, 104 S.Ct. 2549, 2553, 81 L.Ed.2d 446 (1984) (footnote omitted). Section 409(c) of Title 39 states that "[t]he provisions of chapter 171 [the FTCA] and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of

The FTCA as originally enacted did not abolish the plaintiff's action against the negligent government employee. The plaintiff could "sue the employee by asserting his common law right against the tortfeasor or go against the government on the basis of respondeat superior." Note,

---

activities of the Postal Service."

In conditioning the waiver of immunity for the USPS on the provisions of the FTCA, the Congress ensured that "[a]ny tort claim against the USPS must be cognizable under the FTCA." McCollum v. Bolger, 794 F.2d 602, 608 (11th Cir.1986) (per Wisdom, J.), cert. denied, ___ U.S. ___, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); see Insurance Co. of N. America v. United States Postal Service, 675 F.2d 756, 758 (5th Cir.1982). Section 409(c) incorporates the FTCA, but it does not enlarge or diminish the terms of the FTCA.

The Constitutionality and Basic Fairness of the Government Drivers Law, 54 Minn.L. Rev. 645, 651-52 (1970) (footnotes omitted); see also Murdock, The Federal Government as an Insured Under an Employee's Auto Insurance Policy, 36 Mil.L.Rev. 91, 94 (April 1967) (noting that under the original FTCA the "plaintiff could always choose to ignore the FTCA remedy and sue the employee in an appropriate state court"); Comment, 29 Emory L.J. at 755 (1980) (same). Some government employees succeeded in procuring indemnification from the government through passage of private relief bills. S.Rep. No. 736, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Ad. News 2784, 2794; Stevens, Scope of Employment and the Government Motor Vehicle Operator, JAG L.Rev. 13, 14 (Jan.-Feb. 1966). This procedure was expensive and time-consum-

ing, and not all employees pursued it. In response to the problem, Congress in 1961 amended the FTCA by adding four subsections to 28 U.S.C. § 2679. Act approved September 21, 1961, Pub.L. No. 87-258, 75 Stat. 539 (1961). The amendment, known as the Federal Drivers Act (FDA), deprived plaintiffs whose injuries arose from the negligent operation of a government vehicle of any claim against the driver in his individual capacity. "The remedy by suit against the United States as provided by [28 U.S.C.] section 1346(b) ... shall hereafter be exclusive of any other civil action or proceeding...." Section 2679(b) (1961 version) (emphasis added). The design and effect of the FDA was to relieve government drivers "from the hazard of personal liability stemming from driving motor vehicles in the course of official duty." L. Jayson, Handling Fede-

ral Tort Claims § 175.03[1], at 6-17 and 6-18.4 (1986) (footnote citing cases omitted).

In 1966, Congress again extensively amended the FTCA. Act approved July 18, 1966, Pub.L. No. 89-506, 80 Stat. 306 (1966). The amendments imposed a requirement that all tort claimants seek administrative relief before turning to the courts. See U.S.C. §§ 2401(b), 2675(a). Congress was motivated by a desire to reduce congestion in the courts and by statistics showing that most claims against the government were settled, thus suggesting that an administrative scheme could be very effective. S.Rep. No. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad.News 2515, 2516-18; Rise v. United States, 630 F.2d 1068, 1071 (5th Cir.1980) (recognizing these as the reasons for the administrative exhaustion

requirement); Comment, 29 Emory L.J. at 766. The FDA, subsumed in section 2679(b)-(d) of the FTCA, which had previously referred to the plaintiff's exclusive remedy "by suit" was changed to read, "The remedy against the United States provided by sections 1346(b) and 2672 of this title ... shall hereafter be exclusive...." Section 2679(b) (emphasis added). Congress' substitution of the administrative remedies provision, section 2672, for the phrase "by suit" strongly suggests that Congress intended FDA cases to begin with an administrative claim, not a lawsuit. This interpretation is borne out by the legislative history, which states that this change in the FDA was designed to "make it conform" with the administrative exhaustion requirement. S.Rep. No. 1327, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. &

Ad.News 2515, 2521.

Houston argues that the amendment adds an administrative claim as a possible remedy, without eliminating the remedy by suit.[2] Admittedly, Congress could have

---

[2] Section 2679(b)-(d) obviously contemplates that lawsuits can be filed in state court against the individual, for a removal mechanism is provided. But the fact that a claim can be filed does not mean that it can proceed to adjudication on the merits without first being presented for administrative consideration. The most obvious reason to permit suits to be filed against the driver is to toll the state limitations period so that plaintiff preserves his claim against the negligent driver in the event it is later determined that the driver was not acting within the scope of

made the matter clearer by incorporating section 2675(a) within the FDA. Section 2675(a) says, "An action shall not be instituted" until the administrative claim is denied. See Comment, 29 Emory L.J. at 782 (discussing this ambiguity in section 2679(b)). But the interpretation suggested by Houston underestimates Congress' deletion of the phrase "by suit" from section 2679(b) and, more importantly, Houston's interpretation would undermine the goals of efficient administrative settlement and reduced congestion in the courts that Congress sought to achieve by the 1966 amendments.

Finally, it would not be logical to assume that Congress imposed an admini-

---

his employment. See McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir.1980); 28 U.S.C. § 2679(d) (providing for remand to state court in such a case).

strative exhaustion requirement for all tort claims against the United States, except for claims arising from collisions with government vehicles. We see no distinction between the two types of claims, and nothing in the FTCA or its legislative history suggests that Congress did either. In sum, the statute's organization and language, considered in light of the problems that Congress sought to correct with the 1961 and 1966 amendments, lead us to conclude that FDA claims are subject to the administrative exhaustion requirements and limitations periods of the FTCA.

Our interpretation is consistent with the majority of cases discussing the FTCA in its post-1966 era. See, e.g., Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986) (dismissing claim arising from collision with USPS vehicle for failure to file administrative claim

within section 2401(b) limitations period); Rogers v. United States, 675 F.2d 123, 124 (6th Cir.1982) (same); Bialowas v. United States, 443 F.2d 1047, 1049 (3d Cir.1971) (same); Meeker v. United States, 435 F.2d 1219, 1222 (8th Cir.1970) (same); Wilkinson v. United States, 677 F.2d 998, 1000 (4th Cir.) (affirming dismissal of claim arising from collision with automobile driven by a serviceman while on duty because claimant failed to seek administrative relief), cert. denied, 459 U.S. 906, 103 S.Ct. 209, 74 L.Ed.2d 167 (1982); Wollman v. Gross, 637 F.2d 544 (8th Cir.1980) (affirming dismissal of claim arising from collision with automobile driven by employee of the Agricultural Stabilization and Conservation Service because plaintiff's claim for administrative relief was untimely), cert. denied, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed.2d

207 (1981); United States v. LePatourel, 571 F.2d 405, 410 (8th Cir.1978) (reversing district court's refusal to dismiss claim arising from collision with vehicle driven by a federal judge because claimant failed to seek administrative relief), modified to apply prospectively, 593 F.2d 827 (8th Cir.1979) (en banc); cf. Miller v. United States, 741 F.2d 148, 150 (7th Cir.1984) (reversing the dismissal of claim arising from collision with USPS vehicle because within six months of the administrative denial state court suit against individual was filed and removed to federal court, thus timely making the United States a proper party); McGowan v. Williams, 623 F.2d 1239, 1242-43 (7th Cir.1980) (reversing dismissal of claim because state suit against the individual, filed after administrative denial, met the FTCA's requirements even though case was

not removed to federal court until after the limitations period expired).

Two cases--one from the Second Circuit, the other from the Ninth--are out of step with the majority view because they hold that a plaintiff can avoid the FTCA's procedural requirements by filing suit against the government driver in state court. Staple v. United States, 740 F.2d 766, 768 (9th Cir.1984); Kelley v. United States, 568 F.2d 259, 266 (2d Cir.), cert. denied, 439 U.S. 830, 99 S.Ct. 106, 58 L.Ed.2d 124 (1978); see L. Jayson, supra, § 175.03[2] at 6-27 (describing Kelley as the "minority view"); Comment, 29 Emory L.J. at 775 (describing Kelley as "the first and only decision" to hold as it did; this was written prior to Staple). However, we must respectfully reject Staple and Kelley insofar as they permit a plaintiff who

knows or should know that the negligent driver was a government employee to circumvent the FTCA's administrative exhaustion requirement by filing a state suit against only the driver. See Harris v. Burris Chemical, Inc., 490 F.Supp. 968, 970 (N.D.Ga.1980) (noting that Kelley can be read to permit such a result and criticizing such a broad rule).

The facts of Staple illustrate the undesirability of such a rule. After a traffic accident with a USPS vehicle, Lillian Staple filed a state suit against the driver and the USPS. Then she filed an FTCA administrative claim, which was denied. More than a year after this denial, she served process in her state

suit for the first time.[3] The United States certified that the driver was acting in the scope of his employment, removed the case, and sought dismissal on the ground that the plaintiff's state court suit preceded her request for administrative relief, and was thus untimely under section 2675. The district court granted the government's motion, but the Ninth Circuit reversed. That court held that the FTCA's administrative exhaustion requirements and the limitations period in which to file suit after

---

[3] Exactly six months after the denial, Staple had filed a federal court suit against the driver and USPS; this suit was dismissed by the district court because the United States was not named a defendant. See 28 U.S.C. § 2679(a). Staple did not appeal the dismissal. 740 F.2d at 768.

administrative denial apply only to suits brought directly against the United States, and not to state suits brought against the driver. 740 F.2d at 769. The Ninth Circuit's holding exposed the United States to a claim that in no way complied with the prerequisites of the FTCA. We believe this is inconsistent with the congressional intent.

We prefer the approach taken by the Fourth Circuit in Henderson v. United States, 785 F.2d 121 (4th Cir.1986). The court rejected the contention that a state court suit against the individual satisfies the FTCA, and noted that whether plaintiff argues that a state suit against the driver obviates the need for administrative exhaustion or suffices as an administrative claim, the practical effect is the same.

"In neither instance is a claim pre-

sented by the claimant to the appropriate federal agency as required by law. Instead of our current, relatively straightforward system in which all claims must be presented to the relevant agency, we open a door for the multitude of plaintiffs' arguments that the administrative filing requirement was satisfied because the agency was aware of, or had notice of, their claims." 785 F.2d at 125.

See also Meeker v. United States, 435 F.2d 1219, 1221 (8th Cir.1970) (discussing the same issue and commenting, "We think that the purpose of the 1966 amendment to the Act establishing a statutory scheme for initial agency consideration of tort claims ... cannot be so easily defeated."). Henderson held that FDA claims are governed by the administrative

exhaustion requirements and limitations periods of the FTCA.

Like other courts, we recognize the quandary in which a plaintiff may find himself if he has no reason to suspect that the defendant driver is a government employee. See, e.g., Kelley, 568 F.2d at 266; McGowan v. Williams, 623 F.2d 1239, 1243 (7th Cir.1980); Driggers v. United States, 309 F.Supp. 1377, 1379 (D.S.C.1970); see also Comment, 29 Emory L.J. 755, 768-69 (same). An unsuspecting plaintiff will sue only the individual driver and have no reason to pursue the requisite administrative remedies. Then, after the two-year limitations period has expired, the government may certify that the individual was acting in the scope of his employment, remove the case, and procure dismissal on the ground that plaintiff is left without a remedy. Apprehen-

sion of such "sandbagging" underlies Kelley's holding that plaintiffs injured in collisions are not subject to the FTCA's administrative exhaustion requirement. See, e.g., Wollman, 637 F.2d at 549 (distinguishing Kelley on this basis); Reiser v. Di Pietro, 78 F.R.D. 541, 542 (N.D.Ill.1978) (same). In the present case, however, Houston was not ignorant of the fact that Howard was in the course of his employment for the USPS. The postal van was clearly marked as such, and Houston's knowledge is conclusively demonstrated by the fact that he sued the United States and USPS in state court and timely filed an FTCA administrative claim.[4]

---

[4] Most courts reject the Kelley view that when plaintiff did not know that the driver worked for the United States he may

ignore the FTCA's prerequisites. For example, in declining to follow Kelley, the Sixth Circuit stated, "There is no equitable exception to the jurisdictional prerequisites of the Federal Tort Claims Act in this Circuit and we decline to create one." Rogers, 675 F.2d at 124. See also Dunaville v. Carnago, 485 F.Supp. 545, 548 (S.D.Ohio 1980); Fuller v. Daniel, 438 F.Supp. 928, 930 (N.D.Al.1977); Driggers, 309 F.Supp. at 1379; see generally Note, Federal Tort Claims Act, 49 Tex.L.Rev. 165 (1970) ("Since the FTCA requirements are jurisdictional in nature, the federal district courts are without authority to remedy the plaintiff's predicament.") We believe the majority view is persuasive, but the facts of this case do not require

Therefore, we hold that before the United States is forced to defend a tort suit arising from a collision between a private vehicle and a government vehicle, the plaintiff--at least one who knows or should know that the driver was a government employee--must meet the FTCA's administrative exhaustion requirements and then timely commence suit against the government as provided by 28 U.S.C. § 2401(b).

II.

Having concluded that Houston's claim was subject to the FTCA, we must ascertain whether he met the jurisdictional prerequisites of that statute. We hold that Houston did not comply with the FTCA.

The applicable limitations period is stated in 28 U.S.C. § 2401(b):

"A tort claim against the United

---

us to decide that question.

States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

Though phrased in the disjunctive, this statute requires a claimant to file an administrative claim within two years and file suit within six months of its denial. Willis v. United States, 719 F.2d 608, 612 (2d Cir.1983) (per Friendly, J.); Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir.1984); Schuler v. United States, 628 F.2d 199, 201 (D.C.Cir.1980); cf. Reynolds v. United States, 748 F.2d 291 (5th Cir.1984) (dismissing amended

complaint brought against United States after the expiration of the six-month period, even though plaintiff had timely filed an administrative claim).

These limitations periods are jurisdictional. Equitable considerations that may waive or toll limitations periods in litigation between private parties do not have that same effect when suit is brought against the sovereign. E.g., Goff v. United States, 659 F.2d 560, 561 (5th Cir.1981). This is so because under the doctrine of sovereign immunity the government's exposure to liability can be no greater than it permits. Id.; see also Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir.1981) (filing of suit within six months of administrative denial is a jurisdictional requirement); Carr v. Veterans Administration, 522 F.2d 1355, 1357 (5th Cir.1975) (stating that because it is

a waiver of sovereign immunity, the six-month filing requirement must be followed strictly); Quinton v. United States, 304 F.2d 234, 242 (5th Cir.1962) (Hutcheson, J., concurring) ("Section 2401(b) is not a statute of limitations, within the legal definition of that term, ... it imposes ... a jurisdictional prerequisite to recovery...."); L. Jayson, supra § 275.02 (discussing the apparently unanimous view that section 2401(b) is a jurisdictional prerequisite). A recapitulation of the procedural history of this case shows why the district court had no jurisdiction.

Within two years of the accident, Houston sued the USPS, Joseph Howard, and the United States in state court. Houston then timely filed an FTCA administrative claim. After the April 26, 1978 denial of this claim, Houston had six months to file suit against the United States. However,

Houston has never filed suit in federal court. Nor did he serve process on any of the defendants in his premature state suit until almost two years after the administrative denial. In short, Houston did nothing between the time that the USPS denied his claim and the expiration of the six-month limitations period.

Houston proffers three arguments to extricate himself from this predicament. First, relying on Staple and Kelley, he argues that his claim against the United States is not subject to the six-month limitations period in section 2401(b). However, for the reasons given in Part I, we have rejected Staple and Kelley. Second, Houston distinguishes cases, such as Henderson and Meeker, dismissing claimants who failed to file an administrative claim by pointing out that he did file an administrative claim. Apparently we are

to believe that these cases do not apply to Houston. This reasoning is unpersuasive. The FTCA either applies or not. If Houston was required to pursue his claim by the methods and in the time provided by the FTCA, as we held in Part I, then his compliance with the administrative exhaustion requirement does not excuse his failure to timely file suit. Halfway compliance with section 2401(b) is not enough.

Houston's third line of reasoning is that his state court suit tolls the six-month limitations period. For this proposition, he relies on McGowan v. Williams, 623 F.2d 1239, 1241 (7th Cir.1980). The Seventh Circuit held that a state suit against the driver and the government agency, timely commenced after administrative denial, complied with section 2401(b), even though the action was not removed to federal court, and thus the

United States was not made a formal party, until the limitations period had expired. See also Whistler v. United States, 252 F.Supp. 913 (N.D.Ind.1966) (pre-1966 amendments case; suit filed against individual in state court tolls statute as to United States). We need not decide whether McGowan states the proper rule, because it is distinguishable on two grounds.

First, McGowan the driver "received proper notice of the plaintiff's action within the time limitation of Section 2401(b)." 623 F.2d at 1244. The court deemed this to be notice on the United States. Id. By contrast, Houston did not serve any defendant within the six-month limitations period. Second, unlike the plaintiff in McGowan, Houston is relying on a suit brought before he had exhausted his administrative remedies. No court

could have tried his case then. Cf. Reynolds v. United States, 748 F.2d 291, 293 (5th Cir.1984) (holding that a tardy amendment naming the United States as defendant in an FTCA claim could not confer jurisdiction on the court even if the amendment related back to the time suit was commenced because that suit had been filed prior to administration exhaustion).

This latter distinction is especially important. Had the United States been served with process in Houston's state suit, it no doubt would have removed the case to federal court, where the judge would have had to dismiss the case for lack of jurisdiction. See L. Jayson, supra § 175.03[2], at 6-26. This is so because the statute granting exclusive federal jurisdiction to hear tort claims against the United States, 28 U.S.C. § 1346(b), is expressly subject to the pro-

visions of the FTCA, and Houston had not exhausted his administrative remedies, as required by section 2675(a), at the time he commenced his state suit. Reynolds, 748 F.2d at 292. Like the federal court, the Louisiana court could not have adjudicated Houston's claim. The state courts have no jurisdiction to hear even properly exhausted tort claims against the United States. 28 U.S.C. § 1346(b) (vesting exclusive jurisdiction over FTCA cases in the federal courts). The state court also could not have adjudicated Houston's claim against the driver or the USPS because Houston's exclusive remedy was against the United States. 28 U.S.C. § 2679(b). Thus, Houston's state court suit served only to toll the Louisiana limitations period for any later claim to be brought against Howard in the event that he was not acting within the scope of his employ-

ment. See note 2, supra. At the time it was filed, the suit itself could not have been the vehicle for recovery from the United States. The mere pendency of this defective suit during the six-month limitations period, a suit the United States was not formally notified of until must later, did not begin an action under section 2401(b).[5]

---

[5] The result might be different in a case where plaintiff has filed a premature suit against the driver in federal court based on diversity jurisdiction, and then amended his suit to name the United States within the six-month limitations period. The formal ritual of refiling would arguably serve no practical purpose. In dictum, the Third Circuit has suggested that jurisdiction would be established in those circumstances. Morano v. U.S. Naval

Hospital, 437 F.2d 1009, 1011 (3d Cir.1971). We do not reach the question of whether Reynolds forecloses a finding of jurisdiction in those circumstances. Cf. Edwards v. United States, 755 F.2d 1155 (5th Cir.1985) (adding United States as party and effecting service on it within six months is sufficient where suit, though not premature, did not initially name United States).

In this case, it also might be arguable that if the United States had been served in the six months after the administrative denial, and had removed the case to federal court within that time, an action would have timely commenced under section 2401(b) even though the original state suit was premature. Such a theory might even extend to a possibly colorable

Houston relies on a purported absence of prejudice to the government in defending this suit, as well as asserted equities in his favor. However, these factors are not sufficient to overcome the govern-

---

assertion of jurisdiction if the United States, served in the sixth months after administrative denial, deliberately "sandbagged" plaintiff by waiting until the limitations period expired before removing the case. We do not suggest answers to these questions but rather leave their resolution for another day because the facts of this case do not require us to answer them. We strongly emphasize, however, that in FTCA (and FDA) cases prudent plaintiffs will always institute a fresh suit against the United States in federal court sometime in the six months that follow the administrative denial.

ment's immunity to suit. Cf. Childers v. United States, 442 F.2d 1299, 1303 (5th Cir.) (holding against plaintiff whose suit after administrative denial was untimely because confusion at the law firm representing plaintiff caused the denial letter to be filed without ever having been read), cert. denied, 404 U.S. 857, 92 S.Ct. 104, 30 L.Ed.2d 99 (1971). Only by carefully averting the pitfalls of the FTCA can a tort plaintiff bring the federal government into court, and Houston stumbled on the six-month limitations period.

Conclusion

"The United States has the right to define the conditions under which it will be sued." Meeker, 435 F.2d at 1221. Having failed to meet one of those conditions, Houston's claim must be dismissed because the district court had no juris-

diction to hear it. The judgment must be reversed and the case dismissed.

REVERSED.

II. Denial of Petition for Rehearing and Suggestion for Rehearing En Banc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85 3639

ALTON J. HOUSTON,

Plaintiff-Appellee

Cross-Appellant,

versus

UNITED STATES POSTAL SERVICE, ET AL.,

Defendants-Appellants

Cross-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 13, 5 Cir., 1987, _____ F.2d ____) (September 23, 1987)

Before WISDOM, JOHNSON and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED. . . .

ENTERED FOR THE COURT:

/s/ Witt Garwood

United States Circuit Judge

III. Minute Entry of United States District Court for the Eastern District of Louisiana.

MINUTE ENTRY

SEAR, J.

AUGUST 9, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	*	CIVIL ACTION
VERSUS	*	NO. 80-1875
UNITED STATES OF AMERICA	*	SECTION "G"

Plaintiff initially brought this action on January 27, 1977 in Civil District Court for the Parish of Orleans to recover damages for injuries he allegedly sustained when the Sewerage and Water Board of New Orleans truck in which he had been sitting was struck by a United States Postal Service van driven by Joseph Howard, an employee of the Postal Service. Named as defendants in that action were

the United States, the United States Postal Service ("the USPS"), and Howard. None of the defendants were served with process at that time.

On April 21, 1980, plaintiff amended his state court complaint to assert that he had exhausted his administrative remedies under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Two days later he served the United States and the USPS. These defendants removed to this court pursuant to 28 U.S.C. §§ 1441(a) and 1442(a)(1). Howard was finally served on August 19, 1980.

The United States and the USPS moved to dismiss on the ground that this court lacked jurisdiction and that this action was time-barred because it was not commenced in federal court within six months after plaintiff's administrative claim was denied. I found that I lacked jurisdic-

tion over the USPS and therefore granted the motion as to that party. However, because I found that the provisions of the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) applied to plaintiff's claim against Howard, the United States was automatically substituted as defendant in place of Howard by operation of law. Consequently, I found that I had jurisdiction over the United States.

Although this action was not commenced in federal court within six months after plaintiff's administrative claim was denied, I found that under the circumstances of this case, plaintiff's claim was not time-barred. I therefore denied the motion of the United States to dismiss.

On July 22, 1985, nearly two months after trial of this action was completed, the United States once again moved to

dismiss for lack of jurisdiction. The grounds urged by the United States in support of its motion are substantially similar to those asserted in its first motion to dismiss. Accordingly, this motion must be denied for the same reasons stated in this court's order of December 8, 1980.

Trial of this matter was held on April 15-17, 1985. Based upon the evidence, memoranda of counsel, and the law applicable to this case, I make the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

Plaintiff, Alton J. Houston, is 47 years old, single, with two children. His children, however, do not live with him. He has ten years of formal education.

II.

Plaintiff is not licensed to drive a motor vehicle.

III.

Plaintiff was employed by the Sewerage and Water Board of New Orleans beginning on November 5, 1973.

IV.

On January 27, 1976, while still employed by the Sewerage and Water Board of New Orleans, plaintiff was sitting in the right front seat of a truck owned by his employer and parked on St. Charles Avenue.

V.

The truck was parked a distance from the curb such that it occupied nearly one-half of the left traffic lane.

VI.

Joseph Howard, then an employee of the United States Postal Service acting within the course and scope of his employ-

ment, was driving a van owned by the Postal Service down the left traffic lane of St. Charles Avenue in heavy traffic that was moving at approximately five to ten miles per hour.

VII.

Joseph Howard saw that the left traffic lane was partially blocked by the Sewerage and Water Board truck and began to move over to the right traffic lane to avoid hitting the truck.

VIII.

At about the same time, the car in the right traffic lane immediately in front of Joseph Howard's Postal Service van stopped and began backing into a parking place on the right side of St. Charles Avenue. The car was at least one-half car length in front of the Postal Service van and there was very little space between the van and the car following it.

IX.

Joseph Howard attempted to drive the Postal Service van between the Sewerage and Water Board truck which partially blocked the left lane and the car backing in the right lane.

X.

As the postal vehicle passed the truck in which plaintiff was seated, the left hand side-view mirror of the Postal Service van struck the right hand side-view mirror of the Sewerage and Water Board truck, shattering the mirror on the Sewerage and Water Board truck.

XI.

The truck had been parked by an employee of the Sewerage and Water Board other than plaintiff. He was issued a traffic citation for having parked more than 18 inches from the curb.

XII.

Immediately after the collision, plaintiff complained of burning in his eye and of neck pain and was taken to Southern Baptist Hospital for examination. That examination did not reveal any physical injury from the collision.

XIII.

Nevertheless, since that time, plaintiff has complained of head, neck, shoulder, low back and right leg pain, as well as numbness in his right leg. The low back pain reoccurs whenever he attempts to lift anything heavy. Plaintiff has also complained that his right leg occasionally "gives way," causing him to fall.

XIV.

Plaintiff was examined on February 10, 1976 by David W. Aiken, Sr., M.D., a member of the faculty at Tulane Medical School in the department of surgery. Dr.

Aiken found tenderness in various muscles of plaintiff's neck, and a little limitation of rotation and tilting of his neck. Dr. Aiken also found tenderness in the lumber [sic] muscles of plaintiff's back, especially on the right side where he observed some spasm. There was questionable tenderness in plaintiff's right sciatic nerve, and plaintiff tested positive on two tests designed to indicate disc injury (e.g., the straight leg raising test and the Spurling maneuver). Plaintiff also displayed hypoesthesia or numbness over various areas of his right leg.

XV.

Dr. Aiken concluded that plaintiff had a moderate acute cervical sprain, a severe lumbosacral sprain, and right sciatic nerve irritation which suggested the possibility of lumber [sic] disc herniation. At that point, Dr. Aiken believed

plaintiff to have been disabled from working.

XVI.

Dr. Aiken treated plaintiff with infrared heat and ultrasound, and by March 18, 1986, the tenderness in the muscles of plaintiff's neck had disappeared. A lumbar thermogram showed an area of increased heat over plaintiff's right sacroilliac joint, which Dr. Aiken testified was consistent with the pain plaintiff was experiencing from his right leg and the right side of his low back. Dr. Aiken prescribed anti-inflammatory medication and continued treatment of plaintiff.

XVII.

On September 14, 1976, Dr. Aiken referred plaintiff to the psychiatric clinic of Charity Hospital because plaintiff had begun to drink excessively.

XVIII.

Dr. Aiken continued to treat plaintiff regularly through September 27, 1978. Thereafter, he saw plaintiff again on November 14, 1980 and on February 7, 1985. Based on his nine years of treating plaintiff, Dr. Aiken testified that he "never felt in any way that [plaintiff] was a malingerer," and that plaintiff had suffered a lumbosacral disc injury that had "burned out" or resolved itself such that plaintiff experiences chronic, but intermittent pain. He also testified that plaintiff was completely disabled through 1979 and from that time has been ten to twenty percent disabled because of his problems with his back.

XIX.

Prior to the collision, plaintiff drank alcohol primarily on the weekends, and then only moderate amounts of beer. About nine or ten months after the col-

lision, plaintiff's concern for his condition and his lack of a job lead him to begin heavy drinking -- at least a pint, usually of whiskey, per day.

XX.

Plaintiff was admitted to the detoxification clinic at Charity Hospital for two weeks of treatment for preliminary delirium tremens in August, 1977.

XXI.

Plaintiff returned to the Charity Hospital detoxification clinic on January 6, 1984, and when he was discharged on January 13, 1984, he was referred to the New Orleans Substance Abuse Clinic. Plaintiff was thereafter admitted to that clinic on January 18, 1984 for treatment for "alcohol abuse" and for "bad nerves." Plaintiff has drunk no alcohol since January, 1984.

XXII.

Richard Levy, M.D., who performed a neurosurgical examination upon plaintiff on November 8, 1978, testified that he discovered two abnormalities in his examination of plaintiff: (1) slight tenderness over the plaintiff's low back region; and (2) hypoestheia [sic]or numbness in a stocking distribution over plaintiff's right leg. Although Dr. Levy found no organic neurological basis for plaintiff's symptoms, he concluded that nothing in his examination of plaintiff indicated that plaintiff was not truthful in describing his symptoms. Indeed, Dr. Levy testified that he sees patients with stocking distribution numbness for which there was no organic cause "all the time," and that the symptoms are "just as real to [the patient] as if there had been a physical or organic basis."

XXIII.

Dr. Levy also treats patients who experience low back pain, yet have no apparent organic disease. Such patients respond similarly to patients who have an untreatable pain-causing organic ailment -- they became uptight and anxious, or despondent and depressed.

XXIV.

Plaintiff was given psychiatric examinations on April 27, 1981, June 22, 1984, and January 10, 1985 by Alvin Cohen, M.D., who testified that he found plaintiff to be sincere and well-motivated and to relate in an open and honest manner. Dr. Cohen further found plaintiff's memory to be generally good, except that his memory for detail was not clear. Dr. Cohen described plaintiff as being depressed with a lot of tension, intermittently insomniac, and having dizziness, headaches and back and neck pain. Dr.

Cohen found plaintiff to be preoccupied with the accident, and markedly focused on his neck, back, shoulders and head.

XXV.

Dr. Cohen testified that plaintiff exhibits symptoms of both moderate to severe anxiety and depression, but he found no gross evidence of psychosis or any evidence of delusions or hallucinations. Dr. Cohen diagnosed plaintiff as having a generalized anxiety disorder with some depression which was precipitated by the collision that occurred in 1976. Dr. Cohen also found that the accident lead to heavy drinking by plaintiff.

XXVI.

Although Dr. Cohen did not diagnose plaintiff as having a passive-dependent personality, he testified that plaintiff could have been so diagnosed. He further testified that diagnosis of such a per-

sonality was irrelevant in this case because it had "nothing to do with plaintiff's symptoms."

XXVII.

Dr. Cohen's testimony was that plaintiff would not benefit from psychotherapy but that he could benefit from the use of anti-depressant medication. Even with treatment, however, Dr. Cohen found that plaintiff's prognosis for improvement is less than 50 percent.

XXVIII.

Finally, Dr. Cohen testified that plaintiff would have difficulty doing any type of gainful activity, and that plaintiff's present employment in a laundary [sic] for two or three hours a day about three days a week is "the extent of his ability to function in the work world."

XXIX.

F. William Black, Ph.D., an associate

professor of neurology and director of the Neuropsychology Laboratory at the Louisiana State University School of Medicine in New Orleans, testified that he gave plaintiff a neuropsychological examination on June 18, 1984. Professor Black described plaintiff as candid, open, verbal, not malingering, not holding back, no attempting to maximize his discomfort or problems, and not telling a story.

XXX.

Based on plaintiff's performance on a number of specific tests, Professor Black found plaintiff to have a low intellectual level (e.g., Peabody I.Q., 66; WAIS-R, 75) and to be at the borderline or below in other measures (e.g., Boston Naming, Wexler (cognitive), Randt (memory)). Professor Black determined plaintiff's mild inability to describe problems and mild incomprehension to be secondary to

his reduced intellectual level. Plaintiff's performance on various pschomotor tests (finger tapping, grip strength and tactile sensitivity) indicated to Professor Black that plaintiff is depressed, but the depression is not necessarily indicative of emotional trauma. Plaintiff tests as distinctly abnormal on the MMPI, having significant depression, ruminitive anxiety and hyperchondresis.

XXXI.

Professor Black found that plaintiff shows an over-concern with his physical symptoms and over-reacts to minor pain. However, Professor Black found that the pain is as real to plaintiff "as if he had broken his arm."

XXXII.

Professor Black testified that plaintiff's excess drinking was directly

related to the emotional trauma he sustained in the accident.

XXXIII.

Professor Black diagnosed plaintiff as having an exaggerated emotional reaction to his perception of his problems after the collision or, in other words, post-traumatic stress disorder.

XXXIV.

Professor Black concluded that plaintiff is significantly disabled and that because of his low general intellect and the length of time that his symptoms have existed, his prognosis for improvement is not good.

XXXV.

Only one witness, Renee Culver, M.D., testified on behalf of the government. Dr. Culver diagnosed plaintiff as having alcoholism (in remission), psychogenic pain disorder and a passive-dependent

personality.

XXXVI.

Dr. Culver's diagnosis of psychogenic pain disorder was premised on the discrepancy between the plaintiff's physical distress and Dr. Culver's opinion, formed after reading the reports of the physicians who had examined plaintiff, that there was no organic basis for plaintiff's pain.

XXXVII.

Dr. Culver found that plaintiff's personality was passive-dependent because, in his view, plaintiff has a history of passively allowing others to take control of major areas of his life, sees himself as helpless, has an erratic work history, and is an alcoholic.

XXXVIII.

Apparrently [sic] based on his characterization of plaintiff's personality as

passive-dependent and his opinion that plaintiff's work history was erratic, Dr. Culver found that plaintiff dislikes work and that he wants someone to care for him.

XXXIX.

In contrast to the other witnesses, Dr. Culver concluded in his report that plaintiff's present level of functioning and his alcoholism do not bear any direct or indirect relationship to the collision. Instead, Dr. Culver characterizes the collision and the pain that plaintiff experiences as an excuse that plaintiff has used to avoid working. Nevertheless, Dr. Culver testified at trial that plaintiff's psychogenic pain disorder is "related" to the accident.

XL.

In addition to its internal inconsistency, Dr. Culver's testimony is inconsistent with virtually all of the other medi-

cal evidence presented in this case. No other witness believed plaintiff to be malingering or using the collision as an excuse for not working. All believed him to have been truthful in his description of his symptoms.

XLI.

Moreover, notwithstanding Dr. Culver's characterization of plaintiff's work history as erratic, plaintiff testified that although he has held a series of jobs, he had been steadily employed with no period of unemployment longer than one month. Furthermore, plaintiff has never applied for or received unemployment compensation benefits. Finally, plaintiff's expert in personnel placement, Pierre C. Barrios, testified that plaintiff's work history was not unusual for someone having plaintiff's qualifications.

XLII.

Dr. Culver's opinion that plaintiff does not like work is also contradicted by the testimony of two of plaintiff's former supervisors, Philip DeSalvo and Floyd J. Duet, and his present employer, Thomas Chin, who all testified that they considered plaintiff to be a good worker who had no attendance problems.

XLIII.

Subsequent to the collision, in 1978, plaintiff attempted to return to his former job with the Sewerage and Water Board. Plaintiff had to leave work before the end of the day because of pain. Subsequently, plaintiff worked part-time at a liquor store as a clerk but his employment ended when the store ceased business. Thereafter, he has worked at Wah Cleaners, where he had been employed as a dry cleaner for several years in the early

1970s.

XLIV.

Plaintiff presently works for Wah Cleaners two to three hours per day, usually five days per week doing light work like sweeping and cleaning. Plaintiff is paid approximately forty dollars per week. Plaintiff was given this employment by the owner of the cleaners because he knew plaintiff was a reliable employee and because the owner felt obliged to assist his former employee.

XLV.

Pierre C. Barrios, who was qualified as an expert in personnel placement, testified that plaintiff was not commercially employable in the New Orleans labor market. Indeed, Mr. Barrios stated that he would not accept plaintiff as a client for placement because he believed that the chance of finding him employment was

"almost nil." Mr. Barrios stated that his conclusion was based at least in part on plaintiff's physical limitations, his lack of formal education, and inability to drive a motor vehicle.

XLVI.

Nevertheless, plaintiff's employment with the liquor store and the cleaners, together with the testimony of Drs. Cohen, Aiken, and Professor Black, indicates that plaintiff is capable of performing light work. Moreover, plaintiff's present employer, Mr. Chin, testified that plaintiff wanted to work more, but he had no more work available for plaintiff. Plaintiff has made no other effort to seek additional employment. I therefore find that plaintiff is capable of full-time employment earning the minimum wage.

XLVII.

Based on the testimony of Drs. Aiken

and Levy, I find that plaintiff sustained an actual, physical injury from the collision which disabled him from working through 1979. I further find that plaintiff continues to be 20 percent disabled because of the injury to his back.

XLVIII.

I find that plaintiff suffers from mild to borderline mental retardation and that this rendered him susceptible to decompensation from some environmental stimulus. The collision was such a stimulur [sic], and I find that as a result of the collision, plaintiff sustained an emotional injury in the nature of a post-traumatic stress disorder or a psychogenic pain disorder. This emotional injury has caused plaintiff to experience chronic pain, to become depressed and anxious, and to drink excessively for eight years. As a result of this injury, I find that

plaintiff is partially, but permanently disabled.

XLIX.

The parties stipulated to the expertise of Melville Z. Wolfson in the field of economics. Professor Wolfson testified that after subtracting $3,300 he had earned since the collision in 1976, and assuming that plaintiff was taxed as a head of a household, plaintiff had (after tax) lost wages in the amount of $73,903. Professor Wolfson also testified, that on the assumptions that plaintiff is unable to return to gainful employment, he has a work life expectancy to age 61.7, a 5.76 percent annual increase in earning capacity (after adjustment for age), he will earn fringe benefits equal to eight percent of wages, and that the discount rate if 7.4 percent that the present value of plaintiff's future (after tax) lost wages

is $134,584. Alternatively, Professor Wolfson testified that plaintiff's earning capacity at the time of trial was $11,010 per year and that his future (after tax) lost wages can be calculated at $12,213 for each $1,000 of lost earning capacity.

L.

Because Professor Wolfson's calculations assumed that plaintiff was totally disabled, I requested additional information from Professor Wolfson so that I could determine plaintiff's damages if I found him to be only partially disabled. I asked that he prepare an additional report indicating plaintiff's lost wages for each year since the collision and the applicable minimum hourly wage. Together with that information, Professor Wolfson provided tables for use in calculation of the appropriate federal income tax. Certain of the tables, however, are applica-

ble only to the head of a household and cannot be used where, as here, the individual being taxed does not have children who live with him. Therefore, where the appropriate table was not provided, I have calculated the federal income tax based on the rate of tax in effect under 26 U.S.C. § 1(c) during each of the years since 1976.[1] For 1976, the appropriate tax was

---

[1] The tax tables are prescribed by the Secretary of the Treasury under 26 U.S.C. § 3 using the rates prescribed in 26 U.S.C § 1. 26 U.S.C. § 3(a)(1). For the years 1982-1985, the tax was calculated using the rates established in 26 U.S.C. § 1(c) (1983). For the years 1979-1981 and 1977-1978, the tax was calculated using the rates

found in the tax table.

LI.

Professor Wolfson estimates that plaintiff's past (pre-tax) lost wages for the years 1976-1979 total $27,992. After reduction for tax as described in the above paragraph, I find that plaintiff's past (after tax) lost wages for those years are $24,954. Professor Wolfson estimates that for the years from 1980 until the time of trial, plaintiff's past (pre-tax) lost wages are $54,250. Because I found that plaintiff is capable of full-time employment earning the minimum hourly wage, and has been since 1980, the $54,250 must be reduced by $34,950, the amount

---

established in Pub. L. No. 95-600, Title I, § 101(a), 92 Stat. 2767 (1978) and Pub. L. No. 95-30, Title I, § 101(a), 91 Stat. 127 (1977), respectively.

plaintiff could have earned had he worked 2,000 hours per year (50 weeks x 40 hours per week) at the minimum wage. Plaintiff's past lost wages are therefore $19,300 (pre-tax) and $15,960 (after tax).[2] Thus, plaintiff's total past (after tax) lost wages are $40,914.

LII.

Plaintiff's future lost wages may be calculated using the formula provided by Professor Wolfson at trial ($12,213 for each $1,000 loss of earning capacity). Plaintiff's earning capacity according to Professor Wolfson was $11,010. His present earning capacity is $6,700 (40 hours per week x 50 weeks per year x 3.35 per

---

[2] The tax was calculated by applying the appropriate marginal rates to the amount representing plaintiff's lost income for each year.

hour). Plaintiff's lost earning capacity is therefore $4,310. Application of Professor Wolfson's formula reveals that plaintiff's future (after tax) lost wages to be $52,638.

LIII.

Plaintiff has paid medical expenses of $2,045.20 for his two admissions to Charity Hospital detoxification clinic. Plaintiff has also paid a total of $1,290.00 in physicians' fees for treatment and evaluation of the injuries sustained as a result of the collision.

LIV.

Plaintiff's pain and suffering may be compensated by an award of $25,000.00.

Conclusions of Law

I.

This action is within the jurisdiction of this Court under the Federal Drivers Act, 28 U.S.C. § 2679, the Federal

Tort Claims Act, 28 U.S.C. § 2671 et seq., and 28 U.S.C. § 1331.

II.

This Court has jurisdiction over the parties and venue is proper in the Eastern District of Louisiana.

III.

For the reasons stated in this court's order of December 8, 1980, I find that this action was brought within the time limitations of the Federal Tort Claims Act.

IV.

Joseph Howard was negligent in the operation of the Postal Service van.

V.

The negligence of Joseph Howard was the proximate cause of the collision of the Postal Service van with the Sewerage and Water Board truck.

VI.

The United States is liable for the negligence of Joseph Howard under the Federal Drivers Act and the Federal Tort Claims Act because he was acting in the course and scope of his employment.

VII.

Plaintiff was not contributorily negligent.

VIII.

Any negligence attributable to the Sewerage and Water Board from the improper parking of its truck is irrelevant to plaintiff's claim against the United States.

IX.

Plaintiff is entitled to recover damages from the defendant in the amount of $121,887.20.

/s/ Morey L. Sear

UNITED STATES DISTRICT JUDGE

IV. Judgment of the United States District Court for the Eastern District of Louisiana.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	CIVIL ACTION
VS	NO. 80-1875
UNITED STATES OF AMERICA, ET AL	SECTION "G"

J U D G M E N T

For written reasons herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Alton J. Houston, and against defendants, United States Postal Service and United States of America in the amount of $121,887.20 with interest from date of judicial demand.

Dated at New Orleans, Louisiana, this 13th day of August, 1985.

LORETTA G. WHYTE, CLERK

BY CHIEF DEPUTY CLERK

APPROVED AS TO FORM:

/s/ MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

V. Amended Judgment of the United States District Court for the Eastern District of Louisiana.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	CIVIL ACTION
VS	NO. 80-1875
UNITED STATES OF AMERICA, ET AL	SECTION "G"

A M E N D E D J U D G M E N T

For written reasons herein;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Alton J. Houston, and against defendants, United States Postal Service and United States of America in the amount of $121,887.00.

New Orleans, Louisiana, this 6th day of September, 1985.

/s/ LORRETA G. WHYTE

LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

VI. Order of the United States District Court for the Eastern District of Louisiana.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	*	CIVIL ACTION
	*	
versus	*	NO. 80-1875
	*	
UNITED STATES OF AMERICA	*	SECTION G (5)
	*	

****

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that the motion to dismiss for failure to prosecute brought under Federal Rule of Civil Procedure 41(b) by the defendant United States of America is hereby denied on October 2, 1981.

/s/ Morey L. Sear

UNITED STATES DISTRICT JUDGE

VII. Opinion of United States District Court for the Eastern District of Louisiana.

MINUTE ENTRY

SEAR, J.

December 8, 1980

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALTON J. HOUSTON	*	CIVIL ACTION
versus	*	No. 80-1875
UNITED STATES POSTAL SERVICE, ET AL	*	SECTION "G"

Defendants United States and United States Postal Service (USPS) bring this motion to dismiss or for summary judgment, contending that I lack subject matter jurisdiction over the action. Because I conclude that I can exercise jurisdiction over the United States, I deny the motion as to it; however, I grant the motion as to USPS.

Plaintiff Alton Houston was sitting in a Sewerage and Water Board truck parked on a City of New Orleans street on January 27, 1976 when it was struck by a USPS truck driven by Joseph Howard, a postal employee. Exactly one year later, Houston commenced suit in the Civil District Court for the Parish of Orleans naming as defendants the United States, USPS, and Howard. None of the defendants was served with process at that time. Less than a year later, on January 17, 1978, Houston filed an administrative claim with USPS alleging that he had suffered injuries from the collision. On April 26, 1978 USPS denied the claim and advised Houston of his right to sue the Government in federal court within six months. Houston did not commence a federal action, but almost two years later, on April 21, 1980, he amended his still pending state complaint to

assert that he had exhausted his administrative remedies. At that time, the complaint had still not been served on the defendants. Then, on April 23, 1980, Houston served the United States and USPS. On May 21, 1980, the federal defendants removed the suit to federal court pursuant to 28 U.S.C. §§ 1441(a) and 1442(a)(1). Finally, on August 19, 1980, Howard was served with the complaint.

The United States and USPS move to dismiss this action on two grounds, both related to this court's jurisdiction over the action. The Government argues that because the state court lacked jurisdiction over the suit, so do I upon removal. Alternatively, it is contended, even if I could otherwise exercise jurisdiction, the suit is time-barred because it was not commenced in federal court within six months after Houston's administrative

claim with USPS was denied.[1]

A federal court has jurisdiction over an action removed from state court only if the state court had jurisdiction. Minnesota v. United States, 305 U.S. 382, 389, 59 S. Ct. 292, 295, 83 L. Ed. 235 (1939). United States District Courts have exclusive jurisdiction over actions brought against the United States for the torts of its employees. 28 U.S.C. § 1346(b). In addition, only the United States, and not USPS, may be sued for the torts of postal workers. 28 U.S.C. § 2679(a); Myers & Myers, Inc. v. U.S. Postal Service, 527 F.2d 1252, 1256 (2d Cir. 1975); Grasso v. U.S. Postal Service, 438 F.Supp. 1231, 1236 (D. Conn. 1977). Houston argues that 39 U.S.C. § 409(a)[2] grants original but not exclusive jurisdiction in United States District Courts over actions brought against USPS, and

therefore the state court did have jurisdiction over the claim against USPS. But since there is no cause of action against USPS for the torts of its employees, no court, whether state or federal, can exercise jurisdiction over a suit asserting such a claim. Therefore, to the extent that Houston's state complaint was brought directly against the United States and USPS, because the state court lacked jurisdiction, so does this court upon removal.

But Houston also sued Howard, and over that tort claim the state court could exercise jurisdiction. The Federal Drivers Act, 28 U.S.C. § 2679(b)-(e), provides that state actions brought against federal employees for injuries caused by their operation of motor vehicles may be removed to federal court upon a certification by the Attorney General

that the employee was acting within the scope of his employment. Upon removal, the United States is substituted for the driver as the defendant in the action, and the proceeding is deemed one against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Therefore, if the Federal Drivers Act applies in this case, I can exercise jurisdiction over the United States for a claim originally asserted against its employee in state court.

The Act states:

> (b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office

or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall

promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title

and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in Section 2677, and with the same effect.

I note that two requirements of the Act have not been satisfied here. First, under § 2679(c), Howard was required to deliver to USPS the process served upon him while the action was pending in state court. Howard was not served until after

USPS was served, and after the action had been removed; therefore he could not have delivered the process served upon him in accordance with the statute. But this is not a fatal deficiency, since the purpose of § 2679(c), to inform the Government of pending state actions against its employees, was satisfied. The United States and USPS knew as much about the suit when they were served with the complaint as they would have had Howard been served first and delivered the papers to the Government as provided under the statute.

Second, the Attorney General has not issued a certification that at the time of the accident, Howard was acting within the scope of his employment. Indeed, when removing this action from state court, the Government did not formally invoke the Federal Drivers Act but instead relied on

the general removal statutes. I note that the decision to certify that a federal driver was acting within the scope of his employment at the time of an injury has been held to rest within the discretion of the Attorney General, and a court will not ordinarily issue a writ of mandamus to compel exercise of that power. Seiden v. United States, 537 F.2d 867 (6th Cir. 1976); Lemley v. Mitchell, 304 F. Supp. 1271 (D.D.C. 1969).

But the lack of a formal certification from the Attorney General should not preclude my exercising jurisdiction over this suit. The United States has conceded, in its response to the plaintiff's request for admissions, that Howard was acting within the scope of his employment as a postal truck driver on the day of the collision; thus, the provisions of the Federal Drivers Act should apply. Cer-

tainly the Attorney General's certification does not establish a court's jurisdiction, for the statute plainly provides that if it is determined that in fact the driver was not acting within the scope of his employment, the action must be remanded to state court. 28 U.S.C. § 2679(d). See also Seiden v. United States, supra; Lemley v. Mitchell, supra. And if the action is originally commenced in federal court, the requirement of certification does not apply at all. Jones v. Polishuk, 252 F. Supp. 752 (E.D. Tenn. 1966). Finally, once properly removed to federal court, the suit proceeds as one against the United States, with the Government substituted as the defendant by operation of law; no formal motion is required. Whistler v. United States, 252 F. Supp. 913 (N.D. Ind. 1966).

Rather than determining a court's

jurisdiction, the Attorney General's certification serves the purpose of allowing the Government to control which actions are removed from state court to the federal system. Clearly the driver who is sued in state court has a significant interest in seeing the action removed to federal court, since he would thereby be absolved of any personal liability for his tortious conduct. 28 U.S.C. § 2679(b). Similarly the United States has an important interest in preventing the removal of cases to which the Act is inapplicable, i.e., cases where the driver acted beyond the scope of his employment. But where, as here, the Government, which was fully aware of the nature of the suit, has made the decision to remove it to federal court, and acknowledged that its employee was acting within the scope of his governmental duties at the time of the injury,

to insist on some official certification from the Attorney General to that effect would emphasize form over substance without reason.

Therefore, I can exercise jurisdiction over the claim against the United States for the alleged torts of Howard, even though it was originally brought in state court.

Alternatively, the Government argues that even if the suit is otherwise properly before me, it is time-barred. Title 28, U.S.C. § 2401(b) states:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of

notice of final denial of the claim by the agency to which it was presented.

Although Houston filed a timely administrative claim with USPS, he did not commence a federal action within six months after the claim was denied. However, his state action was pending throughout that time, and several courts have held that filing suit in state court tolls the statute of limitations for the Federal Drivers Act. McGowan v. Williams, 623 F.2d 1239 (7th Cir. 1980); Kelly v. United States, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 1018, 99 S. Ct. 106, 58 L. Ed. 2d 124 (1978); Henderson v. United States, supra; Reynaud v. United States, 259 F. 945 (W.D. Mo. 1966); Whistler v. United States, supra. The Fifth Circuit has not yet addressed this issue. It could be argued that under a

literal reading of § 2401(b), Houston was required to recommence his action after the administrative claim was denied; that is what the plaintiff did in McGowan, although the court specifically declined to rule whether recommencement of the action is required by § 2401(b). 623 F.2d at 1241 n.3. But under the facts of this case, it would have been unreasonable to have required Houston to refile, for by the time his administrative claim was denied, a new action against Howard, commenced more than two years after the collision, would have prescribed under state law. Article 3536, Louisiana Civil Code (one year limitation on actions brought for "offenses" and "quasi-offenses"). To be sure, Houston could have commenced an action in federal court, but in so doing he would have run the risk that if Howard were found to have been acting beyond the

scope of his employment, the suit would have been dismissed, leaving Houston without any remedy. And since the Federal Drivers Act clearly provides for suits of this nature to be brought in state court, I cannot conclude that Houston was required to bring two suits, one in state court against Howard, and one in federal court against the United States.

Nevertheless, the Government argues that Houston's state court action cannot be deemed to have tolled the statute of limitations because process was not served on the defendants until more than three years after the suit was filed, and almost two years after the administrative claim was denied. This delay, the Government contends, deprived it of the timely notice to which it was entitled under § 2401(b). However, nothing in § 2401(b) provides that the statute of limitations for tort

claims is tolled by service of process; it mandates only that an action be "begun" within a certain time. Under Rule 3, Federal Rules of Civil Procedure, "[a] civil action is commenced by filing a complaint with the court."[3] Several courts have held that the filing of a complaint, and not the service of process, tolls a statute of limitations. United States v. Wahl, 583 F.2d 285 (6th Cir. 1978); Metropolitan Paving Co. v. International Union of Operating Engineers, Inc., 439 F.2d 300, 306 (10th Cir.), cert. denied, 404 U.S. 829, 92 S. Ct. 68, 30 L. Ed. 2d 38 (1971); Moore Co. of Skeston, Mo. v. Sid Richardson Carbon & Gas Co., 347 F.2d 921 (8th Cir. 1965); Ratcliffe v. Insurance Co. of North America, 482 F. Supp. 759, 763 (E.D. Pa. 1980); Preston v. Mendlinger, 83 F.R.D. 198 (S.D.N.Y. 1979); Weaver v. United California Bank, 350 F.

Supp. 1373 (N.D. Cal. 1972); McCrea v. General Motors Corp., 53 F.R.D. 384 (D. Mont. 1971). The Supreme Court has not yet addressed this issue, Walker v. Armco Steel Corp., ____ U.S. ____, ____ n.11, 100 S. Ct. 1978, 1985 n.11, 64 L. Ed. 2d 659 (1980); nor has the Fifth Circuit. Shelley v. Bayou Metals, 561 F.2d 1209, 1210 (5th Cir. 1977). At least one judge in this district has indicated his view that unless the Government is served with a complaint reasonably soon after it is filed, the statute of limitations is not tolled. Tyrolf v. Veterans Administration, 82 F.R.D. 372, 375 (E.D. La. 1979) (Schwartz, J.).[4] But the approach of Wahl and the other cases cited above is preferable, for it offers a simple method for determining when a statute of limitations is tolled. In addition, the defendant who is served after the applicable period

expires is not left without a remedy: Under Rule 42(b), Federal Rules of Civil Procedure, he may move to dismiss the action for failure to prosecute.

On such a motion, the relevant factors are the length of delay in service; the plaintiff's due diligence in attempting to effect service; and the actual prejudice caused to the defendant by the delay. Preston v. Mendlinger, supra. Although Houston discussed Rule 41(b) in his memorandum in opposition to the motion to dismiss, the Government did not base its motion on that ground. Therefore, it would not be proper to assess the merits of such a claim at this time. Accordingly,

IT IS ORDERED that the motion to dismiss is GRANTED as to USPS, but as to the United States it is DENIED.

IT IS FURTHER ORDERED that Joseph

Howard be dismissed from this action, having been replaced as a defendant by the United States.

/s/ Morey L. Sear

MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

FOOTNOTES

1. The Government also contends that service of process in this case was defective because a copy of the complaint and summons was not sent to the Attorney General in accordance with Rule 4(d)(4), Federal Rules of Civil Procedure. However, Houston has demonstrated that he has complied with the rule by delivering a copy of the complaint and summons to the Attorney General on April 28, 1980; therefore this contention is without merit.

2. 39 U.S.C. § 409(a) states:

> Except as provided in section 3628 of this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought

in a state court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of Chapter 89 of Title 28.

3. Similarly, Louisiana law provides that prescription is interrupted merely by filing a complaint in a court of competent jurisdiction and proper venue. La.R.S. 9:5801. Although, as discussed above, the state court lacked jurisdiction over the United States and USPS, and so prescription was not interrupted as to them as direct defendants, it was as to Howard, over whom the state court did have jurisdiction, and thus also as to the United States in accordance with the Federal Drivers Act.

4. The Government cites the Fifth Circuit's decision in Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir.

1975), as authority for its view that only service of process tolls the statute of limitations. However, that case is inapposite to the facts before me. In Carr, the plaintiff had mistakenly sued the Veterans Administration for the malpractice of one of its doctors under the Federal Tort Claims Act. The plaintiff sought to correct her error by amending the complaint to name the United States as defendant, but the amendment was filed after the six-month period for commencing an action under the Act had elapsed. 28 U.S.C. § 2401(b). The plaintiff attempted to overcome this by arguing that under Rule 15(c), Federal Rules of Civil Procedure, her amendment "related back" to the original complaint, and therefore was timely filed. The Fifth Circuit rejected this contention on the ground that because the original complaint

had not been served on the United States until after the six-month period, the Government did not have actual notice of the suit within the statute of limitations period, and Rule 15(c) was inapplicable.

In Carr, however, there was no Federal Drivers Act which effectuates the substitution of the United States for the federal driver by operation of law. See Henderson v. United States, supra; Whistler v. United States, supra. The issue was purely one of amending a complaint under Rule 15(c).

STATUTES AND REGULATIONS

STATUTES:

28 U.S.C § 1346. United States as defendant

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

with the law of the place where the act or omission occurred."

28 U.S.C. § 2401. Time for commencing action against United States

"(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the

Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

28 U.S.C. § 2679. Exclusiveness of remedy

"(a) The authority of any federal agency to sue and be sued in its own name

shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding

brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of

his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

"(e) The Attorney General may com-

promise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect."

REGULATIONS:

28 CFR § 15.3 Removal and defense of suits.

"(a) The U.S. Attorneys are authorized to make the certifications provided for in 10 U.S.C. 1089(c), 22 U.S.C. 817(c), 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) and 2458a(c) with respect to civil actions or proceedings brought against Federal employees in their respective districts. Such a certification may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or

(1)

4.

1)

the refusal to remove and defend, such civil actions or proceedings by the U.S. Attorneys shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division."

Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1222

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALTON J. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
WILLIAM KANTER
ROBERT K. RASMUSSEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed an action under the Federal Drivers Act, 28 U.S.C. 2679, on the ground that the suit was barred by the statute of limitations, 28 U.S.C. 2401(b), where no federal court action was filed, and no service of process occurred in a state court action, commenced prior to the filing of an administrative claim, until nearly two years after the denial of the administrative claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Bialowas v. *United States*, 443 F.2d 1047 (3d Cir. 1971) .. 10
Caton v. *United States*, 495 F.2d 635 (9th Cir. 1974) 13
Celestine v. *Veterans Admin. Hosp.*, 746 F.2d 1360 (8th Cir. 1984) 13
Dyniewicz v. *United States*, 742 F.2d 484 (9th Cir. 1984) . 5
Henderson v. *United States*, 429 F.2d 588 (10th Cir. 1970) 11
Henderson v. *United States*, 785 F.2d 121 (4th Cir. 1986) 9
Kelley v. *United States*, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978) 10
Kubrick v. *United States*, 581 F.2d 1092 (3d Cir. 1978), rev'd, 444 U.S. 111 (1979) 7, 14
Mathews v. *Diaz*, 426 U.S. 67 (1976) 9, 14
McGowan v. *Williams*, 623 F.2d 1239 (7th Cir. 1980) 11
Meeker v. *United States*, 435 F.2d 1219 (8th Cir. 1970) ... 10
Miller v. *United States*, 741 F.2d 148 (7th Cir. 1984) 11
Morano v. *United States Naval Hosp.*, 437 F.2d 1009 (3d Cir. 1971) 13
Reynaud v. *United States*, 259 F. Supp. 945 (W.D. Mo. 1966) 12
Reynolds v. *United States*, 748 F.2d 291 (5th Cir. 1984) .. 13
Robinson v. *United States*, 408 F. Supp. 132 (N.D. Ill. 1976) 12
Rogers v. *United States*, 675 F.2d 123 (6th Cir. 1982) 9
Staple v. *United States*, 740 F.2d 766 (9th Cir. 1984) ...4, 12, 13
Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980) 8

Cases—Continued: Page

Washington v. *Breaux*, 782 F.2d 553 (5th Cir. 1986) 9
Whistler v. *United States*, 252 F. Supp. 913 (N.D. Ind. 1966) 12
Wilkinson v. *United States*, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982) 9
Willis v. *United States*, 719 F.2d 608 (2d Cir. 1983) 5
Wollman v. *Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981) 10

Statutes and rule:

Act of Aug. 2, 1946, ch. 753, § 411, 60 Stat. 844 (originally codified at 28 U.S.C. (1946 ed.) 932) 7
Act of July 18, 1966, Pub. L. No. 89-506, § 10, 80 Stat. 308 11
Federal Drivers Act, 28 U.S.C. 2679(b)-(e) 2, 3
28 U.S.C. 2679(b) 4, 5, 6
28 U.S.C. 2679(c) 4
28 U.S.C. 2679(d) 4, 5
Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2528 8
Federal Tort Claims Act:
28 U.S.C. 1346(b) 5
28 U.S.C. 1346 note 7
28 U.S.C. 2401(b) ..... *passim*
28 U.S.C. 2672 5
28 U.S.C. 2674 5
28 U.S.C. 2675(a) 5, 6
28 U.S.C. 2071 7
La. Civ. Code Ann. art. 3463 (West Supp. 1988) 9
La. Code Civ. Proc. Ann. art. 561 (West Supp. 1988) 9
Fed. R. Civ. P.:
Rule 4(a) 8
Rule 4(j) 8, 11, 13

Miscellaneous:

128 Cong. Rec. (daily ed. Dec. 15, 1982):
p. H9850 8
pp. H9850-H9851 8

Miscellaneous – Continued: Page

S. Rep. 1559, 80th Cong., 2d Sess. (1948) 7

S. Rep. 1327, 89th Cong., 2d Sess. (1966) 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1222

ALTON J. HOUSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 823 F.2d 896. The opinions of the district court (Pet. App. A23-A43, A47-A59) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1987. A petition for rehearing was denied on September 23, 1987 (Pet. App. A22). The petition for a writ of certiorari was filed as of December 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 27, 1976, petitioner was sitting in a large truck parked on a crowded street in New Orleans. A United

States Postal Service van collided with the mirror of the truck. The truck was undamaged except for a shattered mirror. Pet. App. A1-A2.

On January 27, 1977, exactly one year after the accident, petitioner filed an action in Louisiana court against the United States, the driver of the van, and the Postal Service, alleging personal injuries. He directed the clerk of the court not to serve any of the defendants. On January 17, 1978, just under two years after the accident, petitioner filed an administrative claim with the Postal Service. The agency rejected the claim on April 26, 1978. In the letter informing petitioner of its decision, the Postal Service told petitioner that, if he was not satisfied, he had six months in which to file suit in federal district court. Pet. App. A2.

Petitioner did not file any federal court suit or take any action to effect service in his state court suit within the designated six months. Not until April 23, 1980, almost two years after the denial of petitioner's administrative claim, did petitioner take any action. On that date he served the defendants in the state court suit. The United States removed the case to federal court, and the other defendants were dismissed. Pet. App. A3-A4, A48-A49, A53-A54.

The United States then moved to dismiss the case because petitioner had failed to comply with the statute of limitations of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), which requires suit to be brought within six months of administrative denial and which applies to claims brought under the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), based on injuries allegedly caused by federally employed drivers. The district court denied the motion. Although it was, and is, uncontested that petitioner did not file a federal court action within six months of the

denial of his administrative claim, the court reasoned that "[petitioner's] state action was pending * * * and * * * that filing * * * toll[ed] the statute of limitations for the Federal Drivers Act" (Pet. App. A54). After a three-day bench trial, petitioner was awarded $121,887.20 in damages (*id.* at A2-A3, A43).

The court of appeals reversed (Pet. App. A1-A21). It ruled first that "[Federal Drivers Act] claims are subject to the administrative exhaustion requirements and limitations periods of the FTCA" (*id.* at A9), at least where, as here, the plaintiff knew that the injury-causing driver was a federal government employee acting within the scope of his employment (id. at A13-A15). The court then concluded that, while petitioner complied with Section 2401(b)'s requirement that he file an administrative claim within two years of his accident, he did not comply with the same provision's requirement that suit be begun within six months of denial of the administrative claim. The court stated (Pet. App. A17): "Halfway compliance with section 2401(b) is not enough." Petitioner simply "did nothing between the time that the [Postal Service] denied his claim and the expiration of the six-month limitations period" (*ibid.*). The court explained that, while some state court suits in some circumstances might effectively toll the limitations statute, petitioner's filing of a state court action prior to making an administrative claim or having it denied did not do so: no defendant was in fact served in the state court suit within the six-month period following exhaustion; and at least without a timely post-exhaustion amendment, the pre-exhaustion filing of the state court suit could not be treated as having initiated an FTCA action because, until denial of the administrative claim, there could be no jurisdiction over such a suit (*id.* at A17-A21). The court therefore held petitioner's action untimely and ordered that the case be dismissed for want of jurisdiction.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Although there is some disagreement in the reasoning of several appellate courts on related issues, none of those courts has indicated that a plaintiff who is aware that the driver is a federal employee, and therefore files an administrative claim, may wait two years following the denial of his adminstrative claim before serving process in a lawsuit filed prior to the administrative claim. Only one decision, *Staple* v. *United States*, 740 F.2d 766 (9th Cir. 1984), involved a situation where service in a lawsuit was not effected until after the six-month limitations period of 28 U.S.C. 2401(b) had expired. Although we think that decision is incorrect in allowing service to be effected 12 months after denial of the administrative claim, its factual differences make much less stark any actual conflict of holdings, and we suggest that the issue does not warrant this Court's review at the present time.

1. The Federal Drivers Act makes the Federal Tort Claims Act the exclusive remedy for injuries "resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment" (28 U.S.C. 2679(b)). When a suit is filed in any court against a government employee alleging such injuries, the employee is required to notify his superior, who in turn must "promptly" inform the appropriate United States Attorney, the Attorney General, and the head of the employing federal agency (28 U.S.C. 2679(c)). If the Attorney General certifies that the employee was acting within the scope of his employment when the incident at issue occurred, the case "shall be removed" to the appropriate federal district court (28 U.S.C. 2679(d)) and shall be "deemed a tort action brought

against the United States under the provisions of [the FTCA]" (*ibid.*).

The FTCA in turn provides for a federal court action against the United States for certain torts of its employees (28 U.S.C. 1346(b), 2674). Such an action "shall not be instituted" against the United States, however, unless the claim has been presented to, and denied by, the federal agency that employed the person who committed the alleged tort (28 U.S.C. 2675(a)). (The agency and the Attorney General have the authority to settle such claims (28 U.S.C. 2672).) The FTCA's statute of limitations, 28 U.S.C. 2401(b), requires, first, that the claim be presented to the agency within two years of its accrual and, second, that suit against the United States be commenced no later than six months after the agency's denial of the claim. See *Willis* v. *United States*, 719 F.2d 608, 612 (2d Cir. 1983); *Dyniewicz* v. *United States*, 742 F.2d 484, 485 (9th Cir. 1984).

As the court of appeals correctly held (Pet. App. A4-A15), the administrative claim requirement and the limitations periods of Section 2401(b) apply with full force to suits brought under the Federal Drivers Act, at least where there is no doubt that the plaintiff knew or had reason to believe from the outset that the driver was a government employee acting as such. The Federal Drivers Act states that a tort suit against the driver shall be "deemed a tort action" under the FTCA once the employee is certified as having acted within the scope of his employment (28 U.S.C. 2679(d)). It also states that the FTCA remedies under 28 U.S.C. 1346(b) (FTCA jurisdiction) and 28 U.S.C. 2672 (administrative settlement) are the exclusive remedies against the United States for driver-based torts (28 U.S.C. 2679(b)). Moreover, as the court of appeals explained (Pet. App. A4-A9), the FTCA's mandatory administrative claim procedure (28 U.S.C. 2401(b),

2675(a)), enacted in 1966, is designed to reduce congestion in the courts by providing the government a chance to settle claims prior to any litigation and insisting on prompt litigation after denial of an administrative claim. See, *e.g.*, S. Rep. 1327, 89th Cong., 2d Sess. 2-5 (1966). Exemption of Federal Drivers Act claims would seriously undermine those objectives.

Congress intended no such exemption. The 1966 law that created the current version of Section 2401(b) also amended the Federal Drivers Act, by adding the reference in 28 U.S.C. 2679(b) to agency settlement authority, specifically to "make it conform" with the new administrative claim and limitations provisions (S. Rep. 1327, *supra,* at 8). And the congressional committee reports on the 1966 legislation expressly point to the use of motor vehicles by government agencies, including the Post Office, as a principal cause of the large number of tort claims that were the object of congressional concern in the 1966 legislation (*id.* at 5 (quoting House committee report)).

In addition to correctly holding Section 2401(b) applicable to this case, the court of appeals also correctly held (Pet. App. A16-A17) that petitioner failed to comply with the requirements of that provision. In particular, petitioner failed to comply with the express requirement of Section 2401(b) that an action be "begun within six months * * * of notice of final denial of the claim by the agency." The suit was commenced before the administrative claim was even filed, and in that respect failed to comply not only with Section 2401(b), but with the commandment of 28 U.S.C. 2675(a) that suit "shall not be instituted" until after an administrative claim has been presented and denied. Moreover, no action of any sort was taken to

reinitiate the state court suit until process was served for the first time "*almost two years* after the administrative denial" (Pet. App. A17 (emphasis in original)). During that period, the suit simply did not exist, as far as the driver, the Postal Service, and the United States were concerned.

Like other statutes of limitations, Section 2401(b) represents a congressional "judgment that it is unjust to fail to put the adversary on notice to defend within [the] specified period of time." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). Although a timely filed state court suit that is served with reasonable promptness could satisfy that section's limitations requirement, a lawsuit like petitioner's that is not served on any defendant until 18 months after the limitations period has run cannot constitute a filing that tolls the limitations period applicable to the United States. To conclude otherwise would be incompatible with the concern apparent throughout the FTCA that tort claims against the United States be resolved promptly. The administrative claim process and (if necessary) subsequent lawsuit are both to be commenced within relatively strict time limitations, and those requirements are difficult to reconcile with the absence of any limitation on service of the lawsuit.

Further, a requirement of prompt service has long been implicit in the FTCA limitations provision. Under the Federal Rules of Civil Procedure, which apply to all "civil actions" in federal court by virtue of 28 U.S.C. 2071,[1] the

---

[1] The FTCA, as originally enacted, expressly stated that all FTCA actions would be in accordance with the Federal Rules of Civil Procedure. Act of Aug 2, 1946, ch. 753, § 411, 60 Stat. 844 (originally codified at 28 U.S.C. (1946 ed.) 932). When Title 28 of the United States Code was revised in 1948, the provision was deleted (see 28 U.S.C. 1346 note), but only because Congress thought it redundant. S. Rep. 1559, 80th Cong., 2d Sess. 11-12 (1948).

plaintiff is responsible for ensuring "prompt service" (Rule 4(a)), and absent a showing of good cause, complaints not served within 120 days are to be dismissed without prejudice upon the court's own initiative (Rule 4(j)).[2] While those particular provisions were not in effect at the time this case arose, service of federal court complaints was at that time generally effected by United States marshals, and that procedure was understood to provide for reasonably prompt service. 128 Cong. Rec. H9850 (daily ed. Dec. 15, 1982). Thus, when Congress established the six-month limitations period for FTCA actions in Section 2401(b), it plainly did not contemplate that legally effective notice to the United States—and hence the beginning of litigation of the claim, from the government's point of view—could be delayed far beyond the term specified by the statute.[3]

2. Petitioner offers no statutory analysis to challenge the correctness of the court of appeals' decision. Rather,

---

[2] At the time Congress added subdivision (j) to Fed. R. Civ. P. 4, providing for dismissal without prejudice of an action in which service is not effected within 120 days, Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2528, it made clear that, if service has not been effected and the plaintiff has not made reasonable efforts at service, the filing of the suit does not toll the statute of limitations. See 128 Cong. Rec. H9850-H9851 (daily ed. Dec. 15, 1982).

[3] This Court has recognized that limitations on time for service play an important role in accomplishing the objectives of a statute of limitations. In *Walker* v. *Armco Steel Corp.*, 446 U.S. 740 (1980), where the Court applied a state statute of limitations in a diversity action, it concluded that it should also apply a state law requiring as a precondition to tolling of the statute of limitations that the complaint be served as well as filed. The Court pointed out (*id.* at 751): "The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt

he contends (Pet. 10-21) that the decision is inconsistent with a number of decisions of other courts of appeals and of district courts involving alleged torts by federal drivers. He also argues (Pet. 21-31) that the decision below is contrary to this Court's decision in *Mathews* v. *Diaz*, 426 U.S. 67 (1976). Finally, he contends (Pet. 31-41) that the decision will require plaintiffs in petitioner's position to file two lawsuits—one against the driver, another against the United States. None of those arguments shows the decision of the court of appeals to be incorrect or supports a grant of the petition.

a. With the single exception of the Ninth Circuit's *Staple* decision, the decisions of the courts of appeals firmly support the holding of the court below in this case. Those courts have routinely held—and there is no substantial question—that actions brought under the Federal Drivers Act and removed to federal court as actions against the United States are subject to the FTCA's administrative claim and limitations requirements. See Pet. App. A9-A14; *Henderson* v. *United States*, 785 F.2d 121, 123 (4th Cir. 1986); *Wilkinson* v. *United States*, 677 F.2d 998, 1000 (4th Cir.), cert. denied, 459 U.S. 906 (1982); *Rogers* v. *United States*, 675 F.2d 123, 124 (6th Cir. 1982);

---

to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute."

It follows, in the context of the FTCA, which has its own statute of limitations, that the provisions of federal law for reasonably diligent and prompt service should likewise be applicable. A contrary conclusion would result in the application of no limitation at all on service of process or, if Louisiana law were somehow found applicable, allowance of five years in which to serve the state court action before the statute of limitations would begin to run again. La. Civ. Code Ann. art. 3463 (West Supp. 1988); La. Code Civ. Proc. Ann. art. 561 (West Supp. 1988); *Washington* v. *Breaux*, 782 F.2d 553 (5th Cir. 1986).

Wollman v. *Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981); *Bialowas* v. *United States*, 443 F.2d 1047, 1049 (3d Cir. 1971); *Meeker* v. *United States*, 435 F.2d 1219, 1222 (8th Cir. 1970). Thus, as petitioner all but concedes (Pet. 16-18), plaintiffs must file an administrative claim as a prerequisite to pursuit of any court action under the Federal Drivers Act.[4] And following denial of such a claim, they must comply with the requirement of Section 2401(b) that the action be begun within six months.

Petitioner offers extensive authority for a proposition on which this case does not turn—that a suit filed in state court can, under some circumstances, toll the running of the FTCA limitations period. With one exception,

---

[4] Petitioner nonetheless purports to rely on *Kelley* v. *United States*, 568 F.2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978), where the court allowed a suit that was originally brought in state court against the driver to proceed against the United States under the Federal Drivers Act even though an administrative claim had not been filed. No other court of appeals in the ten years since *Kelley* has followed that ruling, and we believe that it is incorrect. In any event, the issue of compliance with the administrative claim requirement is not presented in this case, since all agree that a timely claim was filed. The problem here is a failure to proceed with timely service process in the lawsuit following denial of the claim, so as to accomplish the notification purposes of Section 2401(b) that the Second Circuit found fulfilled in *Kelley*. Because it involved no administrative claim at all, *Kelley* necessarily failed to address the question of what the statute requires following denial of such a claim.

Even if *Kelley* were correct and the administrative claim requirement were in issue here, that case is plainly distinguishable from this one because, as the Fifth Circuit here noted (Pet. App. A13) and the *Kelley* court itself stressed (568 F.2d at 261-262), the plaintiffs there were unaware—through the fault of the driver and the government—that the driver was a federal employee acting within the scope of his employment.

however, the decisions cited present no instance of delay in filing or service of the lawsuit, such as that on which the decision below rested. Those decisions are fully consistent with the holding of the court below that a pre-claim state court suit that was not served for two years after denial of the claim "did not begin an action under section 2401(b)" (Pet. App. A19).

In *Henderson* v. *United States,* 429 F.2d 588 (10th Cir. 1970), where there was no administrative claim requirement because the case arose before the effective date of the 1966 amendments to 28 U.S.C. 2401(b),[5] a timely filed state court suit against the driver tolled the then-applicable statute of limitations. The decision does not mention any assertion of delay in either the filing or service of the suit. In *McGowan* v. *Williams,* 623 F.2d 1239 (7th Cir. 1980), the state court suit against the driver was filed within six months of the denial of the administrative claim, was promptly served on the driver, and was brought to the attention of the United States Attorney.[6] See Pet. App. A18-A19. And in *Miller* v. *United States,* 741 F.2d 148 (7th Cir. 1984), within six months of the constructive denial of plaintiff's timely administrative claim, the plain-

---

[5] The claim in *Henderson* arose in December 1966 (429 F.2d at 589). The 1966 amendment to 28 U.S.C. 2401(b) applies only to claims that accrued after January 18, 1967. Act of July 18, 1966, Pub. L. No. 89-506, § 10, 80 Stat. 308. The 1966 amendment not only added the administrative claim requirement but, as we have shown (see pages 5-6, *supra*), made clear Congress's intent that the requirements of Section 2401(b) apply to Federal Drivers Act suits.

[6] The United States Attorney entered an appearance and sought removal of the suit three months after it was filed. The federal policy of prompt legally effective notice to the federal government (see pages 7-8, *supra*) was plainly satisfied. Cf. Fed. R. Civ. P. 4(j) (service must occur within 120 days).

tiff filed and the United States removed a state court action against the driver.[7]

The Ninth Circuit's decision in *Staple* v. *United States, supra,* like this case and unlike all of the other decisions relied on by petitioner, involved a plaintiff who delayed service in a state court suit following denial of an administrative claim. Two months after the accident at issue, the plaintiff filed a state court action against, but did not serve, the government driver. She then filed a timely administrative claim, which the agency denied. Within six months, the plaintiff filed suit in federal court; but because she failed to name the United States, that suit was dismissed, and she did not appeal the dismissal. Not until one year after the administrative denial did the plaintiff serve her state court suit, which was then removed by the United States. 740 F.2d at 768. The court of appeals held, first, that administrative exhaustion need occur only before removal (not before the filing of the state court suit) and, second, that the plaintiff's state court filing tolled the running of the statute of limitations against the United States (*id.* at 769-770).

---

[7] Similarly, none of the three district court decisions cited by petitioner (Pet. 14) is contrary to the result reached by the court of appeals here. In *Robinson* v. *United States,* 408 F. Supp. 132 (N.D. Ill. 1976), the state court suit may have been filed after the administrative denial, but even if it was filed before the denial, there is no indication that the complaint was not amended to reflect the denial or that the suit was not promptly served on the driver and brought to the attention of the United States. In *Whistler* v. *United States,* 252 F. Supp. 913 (N.D. Ind. 1966), which was decided before the 1966 amendment to the applicable statute of limitations (*i.e.,* before the administrative claim requirement was added), the state court suit against the driver was brought within two years of the accident, promptly served, and removed by the United States within one month. In *Reynaud* v. *United States,* 259 F. Supp. 945 (W.D. Mo. 1966), also governed by the pre-1967 law, the suit was held to be out-of-time.

We agree with the court of appeals in this case (Pet. App. A10-A12) that the *Staple* decision is incorrect and that it is in substantial tension, if not outright conflict, with the decision in this case. Nevertheless, we do not think that this Court's review is warranted here. Although the two courts took different views of the statutory requirements that a plaintiff must meet, the factual differences between the two cases make any actual conflict much less stark than it may at first appear. The plaintiff in *Staple*, unlike petitioner, did file suit against the federal government (although she named the wrong party) within six months after the administrative denial. And the state court suit in *Staple* was served roughly six months, not 18 months (as here), after the time for filing suit had run. It is arguable—especially in view of the timely (but defective) federal court suit—that the service in the state court suit just over six months after the proper filing date should be found sufficiently prompt to meet the requirements of 28 U.S.C. 2401(b) in effect at that time, prior to the amendment of the Federal Rules setting a presumptive limit on service of 120 days (Fed. R. Civ. P. 4(j)). No similar argument is available here, where no suit was filed within the allowed time, and service was not effected until roughly 18 months after the time for filing had passed.[8]

In any event, insofar as a conflict does exist between the Fifth and Ninth Circuits, the situation that gives rise to the conflict arises so rarely that this Court's review is not called for—certainly not in a case, like this, were the correct result is manifest. For the situation to arise, a plaintiff must know that he was injured by a government employee acting as such, must file a premature state lawsuit against

---

[8] We also note that, while petitioner did not effect service in any suit until more than four years after the accident, service on the driver in *Staple* was effected only 19 months after the accident and certification by the Attorney General less than two years after the accident.

the individual employee but direct that it not be served, must file an administrative claim within two years of the accident, and, after its denial, must then fail both to serve the state suit promptly and to file a federal court action directly against the United States within six months. Such plaintiffs, who are routinely informed of the time for filing suit in the denial letter sent by the agency, are well aware of the FTCA's six-month statute of limitations; they simply fail to comply with it. That this case and *Staple* are the only two cases presenting this fact pattern, although the current version of the FTCA's statute of limitations has existed for over 20 years, confirms that these cases are few and far between.

b. Petitioner argues (Pet. 21-31) that his premature state court suit (filed before administrative exhaustion) should have been held sufficient because the prematurity may be cured by an amendment. That argument is unsupportable in circumstances like those presented in this case. We agree that a pre-exhaustion suit may be rendered effective if it is amended within the six months following denial of the administrative claim and served in a timely manner.[9] Certainly, however, no such cure is effected by complete inaction for two years following the administrative denial. See *Reynolds* v. *United States*, 748 F.2d 291 (5th Cir. 1984); *Caton* v. *United States*, 495 F.2d 635, 638 (9th Cir. 1974); *Morano* v. *United States Naval Hosp.*, 437 F.2d 1009, 1011 (3d Cir. 1971).[10]

---

[9] The court of appeals explicitly reserved judgment on whether and under what circumstances such a premature suit might be rendered effective by amendment or other action taken during the period following denial of the administrative claim (Pet. App. A19-A20 n.5).

[10] In *Celestine* v. *Veterans Admin. Hosp.*, 746 F.2d 1360 (8th Cir. 1984), although the plaintiff did not formally amend his pending lawsuit after his administrative claim was denied, the court of appeals

Petitioner's reliance on *Mathews* v. *Diaz, supra*, is misplaced. The Court there merely held that when a plaintiff exhausts his administrative remedies during the course of a pending suit, and informs the court of that fact, the notice should be treated as a supplemental complaint (426 U.S. at 75). Nothing in *Mathews* suggests that, where no court is informed of the required administrative exhaustion and no defendant is informed of the lawsuit until long after the statute of limitations has run, a time-barred claim can be revived. See *ibid.* (footnote omitted) ("[a] supplemental complaint in the District Court would have eliminated th[e] jurisdictional issue").

c. Finally, petitioner suggests (Pet. 31-41) that his suit should be allowed because individuals injured by government drivers, not knowing whether the driver was acting within the scope of his employment, should not have to file two suits – one in state court against the driver and one in federal court against the United States. That concern plainly underlies some of the decisions discussed above concerning the sufficiency in some circumstances of a single state court suit against the driver. But the concern has no application to petitioner. He was aware that the driver was acting within the scope of his federal employment (Pet. App. A13-A14), and thus he did not face the hypothetical dilemma posed by petitioner. Any injured party who has reason to think the driver was acting for the government has a ready means for protecting his claim by

---

held that, because the United States had moved to dismiss the lawsuit and knew that the claim was denied, the district court had effectively been informed of the denial of the administrative claim. In *Kubrick* v. *United States*, 581 F.2d 1092, 1098 (3d Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), the court stated that no refiling or amendment was necessary because no substantial action had taken place in the case; the United States did not contend otherwise and clearly had previously had notice of the suit.

the filing of a single suit against the driver, subsequent amendment of the action to reflect the government agency's denial of the required administrative claim, and service of the amended suit on the driver within six months of the agency's action.

Even were it relevant here, the dual-suit problem raised by petitioner would offer no excuse for ignoring the FTCA limitations provision. Any potential FTCA plaintiff, not just those covered by the Federal Drivers Act, may have some question about whether the injury-causing government employee was acting within the scope of his employment. Congress undeniably wanted even such plaintiffs to comply with the FTCA's statute of limitations if they are to recover against the United States. Thus, when an injured party has some reason to believe that the tortfeasor was acting within the scope of government employment, he must, to obtain a judgment against the United States, take steps to comply with the requirements of 28 U.S.C. 2401(b), which are not discretionary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

WILLIAM KANTER
ROBERT K. RASMUSSEN
Attorneys

MARCH 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60364